

Digitized by the Internet Archive
in 2011 with funding from
CARLI: Consortium of Academic and Research Libraries in Illinois

WILLIAM H. KIRBY, et al.,

2 } I.A.³ 46Plaintiffs-Appellees,) APPEAL FROM THE
) CIRCUIT COURT OF
) COOK COUNTY

vs.

WALTER A. KOLBOSH, et al.,

) HON. CHARLES R. BARRETT
) JUDGE PRESIDING.

Defendants-Appellants,)

VILLAGE OF HOFFMAN ESTATES,

Defendants.

MR. JUSTICE BURMAN delivered the opinion of the court.

ABST.

The plaintiffs, owners of property in a subdivision called Pleasant Acres, instituted this action (1) to enjoin other owners of property in the same subdivision from constructing any structure in violation of a covenant which was included in the original deed for each lot in the subdivision and (2) to enjoin the Village of Hoffman Estates from issuing building permits for any structure which would violate the covenant. The property in the subdivision under the terms of the covenant could only be used for single family residential purposes. A motion for summary judgment by the plaintiffs was granted.

The defendants appeal and have filed briefs and have otherwise complied with all statutory requirements and rules of court for the perfection and prosecution of this appeal. No briefs were filed in opposition by the plaintiffs. They were properly served with notice of the notice of appeal.

Where, after due notice, an appellee fails to appear, files no briefs and presents no argument in support of an order or judgment entered in the Circuit Court, this court may reverse the order or judgment without a consideration of the merits. C.I.T. Corporation v. Blackwell, 281 Ill.App.504, 541 Briar Place Corporation v. Harman, 46 Ill.App.2d 1, 196, N.E.2d 498, Ogradnev v. Daley, 60 Ill.App.2d 82, 208 N.E.2d 323, Gibraltar Corporation v. Flo Budd Antiques, Inc., Gen. No. 54628 269 N.E.2d 515.

Wherefore, we are constrained to reverse the judgment with directions to dismiss the Complaint.

Judgment reversed and remanded with directions.

Dieringer and Stamos, JJ.,

Concur.

(Abstract only)

2IA³

1 2

I.A.³ 716

54520
54521
54522
54523

MAR 20 1972

ABST.

PEOPLE OF THE STATE OF ILLINOIS,)	
	)	APPEAL FROM THE CIRCUIT
Plaintiff-Appellee,	)	COURT OF COOK COUNTY.
)	
vs.)	
)	
MELVIN BELL, et al.,	)	Hon. L. Sheldon Brown,
	)	Presiding.
Defendants-Appellants.)	

MR. JUSTICE GOLDBERG delivered the opinion of the court:

Defendants, Melvin Bell, James McGrew, Nathaniel Walls and John Brown, were all indicted for robbery (Ill.Rev.Stat. 1967, ch.38, par.18-1) and for aggravated battery (Ill.Rev.Stat. 1967, ch.38, par.12-4). All four defendants were jointly tried by the court without a jury. Larry Brown, also indicted with the four defendants, was not tried with them for reasons not pertinent to this appeal. The trial court found all four defendants guilty of robbery and of battery (Ill.Rev.Stat. 1967, ch.38, par.12-3). Defendant James McGrew was sentenced to a term of six to 20 years for each offense, to run concurrently. All and each of the three remaining defendants were sentenced to terms of two to 20 years for each offense, to run concurrently. Since all four cases rest upon the same factual basis and since all four defendants raise the same contentions here, their several appeals have been consolidated for hearing and one brief has been filed for all.

All defendants join in contending that there is a fatal variance between the indictment and the proof; that their identification was insufficient and that all sentences are excessive. After a factual statement, each contention will be considered in order.

Bertha Campos, complaining witness, testified that she lived on the third floor of an apartment building in Chicago. At 12:15 a.m. she heard a knock on her front door. After some conversation through the door, she told the callers to leave or she would call the police. They responded by breaking open the door and entering. Larry Brown, the defendant not on trial, beat her about the head and face and demanded money. A police photograph of the witness, received in evidence without objection, depicts the bruises on her person. She was then made to lie down on the floor and covered with a sheet. She was beaten further and kicked by defendant Bell and additional demands for money were made. She partly lifted the sheet and saw defendant Bell rummaging through the drawers in the apartment. She then led Larry Brown to the closet and gave him \$150 in cash from her pocketbook. After about 15 minutes, the police entered. The witness testified that she also missed cuff links, a radio and a television set but all of these items were recovered by the police. She was given first aid treatment at a hospital and released. After some preliminary uncertainty at trial, she identified all four of the defendants as those who had committed the crimes. She was not cross-examined.

A police officer testified that he responded to a police radio request and entered the building. He saw defendant Walls immediately outside the door of the apartment. Defendant started to run but was ordered to stop and was apprehended. The officer found the door broken off at its hinges. He saw defendant John Brown in the kitchen. This defendant started to run. The officer pursued him with drawn gun. Defendant ran into the bedroom and jumped out of the window. The officer saw him lying on the sidewalk below. He also saw Larry Brown, not on trial, hiding under a kitchen table. He next found defendants

James McGrew and Melvin Bell hiding under a sheet in the pantry. This witness positively identified each and all of the defendants present in court. He also verified the bruised condition of complaining witness as depicted in her photograph.

In the hallway outside of the apartment, close to the door, the officer found a television set, a radio and jewelry; the missing property of the complaining witness. All of the arrested persons were searched but the cash sum described was never found.

The defendants testified in their own behalf. Each gave a similar version of the affair; differing radically from the State's case. In substance, all of them had been drinking together at a tavern across the street. They entered the building where complaining witness lived and went up to the third floor only for the purpose of drinking more from a pint bottle in their possession. Mrs. Campos opened her door, ordered them out of the hall and shut the door. In a few minutes, the police arrived and forcibly pushed all defendants into the apartment. Defendant John Brown tried to escape but a police officer hit him with a pistol and he fell back through the window. He remembered nothing further. A community organizer testified that defendant John Brown had a good reputation in the community as a peaceful and law-abiding citizen.

Defendant Melvin Bell testified that he had started to leave the group about a minute and a half after the complaining witness had addressed them. He was partly downstairs when he was seized by a police officer and pushed back up the stairs and into the apartment with the others. He identified Detective

Frank Blasch as having been present. Blasch testified in rebuttal that he was not present at the scene but that he merely assisted in paper work at the police station after the arrest.

Defendant Nathaniel Walls was arrested in the hallway outside of the apartment. He was the only defendant then in the hallway. He did not know where all of the other defendants were at the time of the arrest. Defendant James McGrew testified that he was arrested close to the stairway on the third floor. He and some of the other defendants were pushed into the apartment by the police. He was never in the pantry. He also testified that he saw Detective Blasch at the scene. All defendants testified that no one struck the complaining witness or touched any of her property. No one asked her for money. The door was never broken.

Defendants' first contention is fatal variance between the indictment and the proof. We find no variance here. People v. Mosby, 25 Ill.2d 400, 403 cited by defendants is one of a number of decisions by our Supreme Court which states the doctrine of variance quite clearly:

"Essential allegations of indictments must be proved without variance. (People v. Walker, 7 Ill.2d 158; People v. Pernalsky, 334 Ill. 38; People v. Smith, 341 Ill. 649.) An essential element of proof to sustain a conviction cannot be inferred but must be established."

In the case at bar, the four indictments charged defendants with robbery of \$150 by force and threats from the person and presence of the complaining witness. Her testimony supported this allegation with complete precision. Defendants all denied this. This merely created a conflict in the evidence which it was the duty of the trier of fact to resolve. Of course, the

trier of fact is not necessarily bound by the number of witnesses on either side. In such cases of conflicting evidence, a court of review may not substitute its judgment for that of the trier of fact unless the evidence is so improbable or unreasonable or so contrary to human experience as to leave a reasonable doubt of defendants' guilt. People v. Rush, 126 Ill. App.2d 136, 143. Additional citations in support of this venerable principle are hardly required. A few illustrations are: People v. May, 46 Ill.2d 120, 125; People v. Morehead, 45 Ill.2d 326, 329; People v. Rodriguez, 129 Ill.App.2d 1, 8, 9.

The fact that the search of all arrested persons failed to reveal the missing money does not establish a variance. Recovery of the loot is not an essential element or allegation in any of the crimes against property described in the Illinois Criminal Code. Absence of the money is merely one of the circumstances to be considered by the trier of fact. The able and experienced trial judge undoubtedly considered this circumstance together with all of the remaining evidence in arriving at his findings and judgment. Defendants here elected to explain their presence at the scene of the crime. Consequently it was incumbent upon them "****to tell a reasonable story or be judged by its improbabilities." People v. Morehead, 45 Ill.2d 326, 330. The trial court heard the explanation advanced by defendants and termed it "preposterous". This characterization was actually charitable to defendants. In our opinion, the evidence supports the findings of the trial court regarding guilt of each and all of the defendants beyond reasonable doubt.

The second contention of defendants regarding identification is completely without merit. There is no issue of identification here. Defendants all testified that they were present

at the scene. The only remaining issue was determination of the weight of their evidence compared to the conflicting evidence of the prosecution witnesses as above pointed out.

The final contention of all defendants is severity of the sentences. We have power to reduce the sentences, 43 Ill.2d Rule 615(b)(4). We may, however, exercise this power only with considerable caution in a proper case (People v. Holmes, 127 Ill. App.2d 209, 214), where it is manifest that the sentence is excessive and not justified by any reasonable view which might appear from the record (People v. Glasgow, 126 Ill.App.2d 82, 90), and then only where the sentence is "***greatly at variance with the purpose and spirit of the law or manifestly in excess of the proscriptions of section 11 of article II of the Illinois constitution." People v. Hampton, 44 Ill.2d 41, 48 citing People v. Taylor, 33 Ill.2d 417 and People v. Smith, 14 Ill.2d 95.

We will consider the robbery sentences first. Defendant Melvin Bell is 17 years old. He is a first offender without prior arrest or conviction. That is a "significant factor" in reduction of sentencing, People v. Miller, 266 N.E.2d 427, 430 (Ill.App. 1971). However, in view of all the circumstances shown by the evidence, his sentence for robbery to a term of from two to 20 years will be affirmed.

Defendant Nathaniel Walls is 22 years old. He was sentenced in 1968 to six months in the House of Correction on a charge of grand theft reduced to petty theft. He was fined \$25 for battery in 1968. His sentence to a term of two to 20 years for robbery will be affirmed.

Defendant John Brown is 22 years old. He was fined for aggravated assault in January of 1966. Although he produced evidence

of his previous good reputation, his sentence of two to 20 years in the penitentiary for robbery will be affirmed.

Defendant James McGrew is 25 years old. He was previously convicted for robbery and sentenced to the penitentiary. His sentence for robbery to a term of six to 20 years in the penitentiary will be affirmed. The principles above cited require affirmance of these sentences.

All four of the defendants were also found guilty of battery, the lesser offense included in their indictment for aggravated battery. However, in each case the penitentiary sentences imposed are excessive. The penalty for battery is a fine not to exceed \$500 or imprisonment other than in the penitentiary for six months, or both, Ill.Rev.Stat. 1967, ch.38, par.12-3b. "To the extent that the sentence of imprisonment in this case exceeded that which could legally have been imposed, it is void." People v. Simpkins, 48 Ill.2d 106, 111 citing People v. Hamlett, 408 Ill. 171. Consequently, all sentences imposed for battery are reduced to misdemeanor sentences of six months each to be merged into and served concurrently with the felony sentences imposed for robbery. This procedure is justified, at least by analogy, in Ill.Rev.Stat. 1969, ch.108, par.49.1.

We, therefore, modify the four judgments herein so as to provide for sentences to defendants as follows: Melvin Bell sentenced to the penitentiary for a term of two to 20 years for robbery with concurrent sentence of six months for battery; defendant Nathaniel Walls sentenced to the penitentiary for robbery for a term of two to 20 years with concurrent sentence for battery of six months; John Brown sentenced for robbery

to the penitentiary for a term of two to 20 years with concurrent sentence of six months for battery; and defendant James McGrew sentenced for robbery to the penitentiary for a term of six to 20 years to run concurrently with sentence of six months for battery.

As modified, each and all of the four judgments are affirmed.

Judgments modified and affirmed.

BURKE, P. J. and LYONS, J. concur.

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

vs.

ROOSEVELT SANDERS,

Defendant-Appellant.)

APPEAL FROM THE CIRCUIT
COURT OF COOK COUNTY.HONORABLE SAUL A. EPTON,
Presiding.

MR. JUSTICE STAMOS DELIVERED THE OPINION OF THE COURT.

ABST.

After a trial without a jury, defendant was convicted of aggravated incest* and sentenced to the penitentiary for a term of five to sixteen years.

Defendant contends that it was prejudicial error to admit evidence that on a prior occasion he attempted to have sexual intercourse with the victim, his 13 year old daughter. Defendant further contends that his sentence was excessive and should be reduced.

Defendant's initial contention is without merit. In People v. Turner, 260 Ill.84, an incest case, it was specifically declared that in cases involving sexual relations, evidence of prior acts between the accused and the complaining witness is admissible.

The sentence is within the statutory limit and this court should not substitute its own judgment and disturb the sentence unless it clearly appears that the penalty constitutes a great departure from the law's purpose and spirit, or that the penalty is manifestly excessive in that it lacks any proportion to the nature of the offense. People v. Taylor, 33 Ill.2d 417. Defendant had been convicted of robbery in 1964 and placed on four years probation.

Judgment is affirmed.

JUDGMENT AFFIRMED.

LEIGHTON, P.J., and SCHWARTZ, J., concur.

(ABSTRACT ONLY)

* Ill.Rev.Stat. 1967 ch. 38 § 11-10.

"Aggravated Incest] (a) Any male person who shall perform any of the following acts with a person he knows is his daughter commits aggravated incest:

(1) Has sexual intercourse; or
(2) An act of deviate sexual conduct."



ABST.

MAR 20 1972

54880

2 I.A.³ 88

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

vs.

ROBERT TANKSON and RUDOLPH REED,

Defendants-Appellants.

APPEAL FROM THE CIRCUIT

COURT OF COOK COUNTY.

Hon. Louis B. Garippo,
Presiding.

MR. PRESIDING JUSTICE McNAMARA delivered the opinion of the court:

Both defendants were charged with the crimes of robbery and armed robbery. After a bench trial, they were found guilty of robbery and each was sentenced to terms of 1 to 3 years. Both appeal, contending that the trial court erred in denying their motions to suppress the identifications and that they were not proved guilty beyond a reasonable doubt. The facts are as follows.

On the evening of May 28, 1969, Eddie Riley visited the race track where he testified that he won two hundred eighty-five dollars. After the races he returned to Chicago and visited a tavern where he had a couple of drinks. Riley had lent eighty-five dollars to a friend and had four fifty dollar bills when he entered the tavern. He paid for the drinks with a fifty dollar bill and received change. He then left the tavern to catch a bus. While waiting for the bus, a man whom Riley identified as defendant Tankson approached and asked for his money or his life. Riley tried to fight, but two other men came running up, one of whom he identified as defendant Reed. Riley tried to escape into a Chicago Transit Authority depot but was caught by the three men. The three dragged him into an alley, beat him and took his money. One of the men, Riley was unable to say which, pulled a knife. Police officers arrived immediately after the incident. Riley informed them of what happened and pointed out that the three were escaping up the alley. Riley entered the police car, and the police drove around the block to head the assailants off at the other end of the street. As the police drove, Riley described

one of the assailants as being tall, much taller than himself, and wearing a wine colored slipover sweater. He described the second assailant as being about the same height as himself and wearing a plaid coat. The third assailant, never apprehended, he described as a light skinned Negro wearing a beige jacket. About a block away, Riley observed the defendants on the street. The police arrested them, and Riley identified them as two of his assailants. Riley stated that he was bruised and bleeding. Riley also testified that the police showed him a knife recovered from defendant Reed, and it looked like the knife which had been drawn on him. He denied that he stated at the preliminary hearing that he won one hundred dollars at the races.

Officer Drink of the Chicago Police Department testified that when he arrived on the scene the victim said: "There go the three men that robbed me". The men were about five or six houses away at the time, and Drink testified that two of the men were the defendants whom he apprehended a few minutes later. The police officer recovered seventy-six dollars, including a fifty dollar bill, from defendant Tankson and a pocket knife from defendant Reed. The officer did not observe any blood or bruises on Riley. He also testified that Riley told him he won about two hundred eighty-five dollars at the races but he heard Riley state at the preliminary hearing that he had won one hundred dollars.

Defendants first argue that the court erred in denying their motion to suppress their identifications by the victim. Relying on Stovall v. Denno, 388 U.S. 293 (1967), they contend that the pretrial confrontation was so grossly suggestive and conducive to irreparable mistaken identity as to require a reversal.

Under the facts and circumstances of the instant case, we believe that the on-the-street observation of defendants by the victim after the robbery could not be characterized as a confrontation or as a lineup, nor could it be considered so

suggestive as to result in any prejudice to defendants' rights. Immediately after the crime, the victim pointed out three fleeing men to the police as the men who robbed him. He then accompanied the police officers as they pursued his assailants. Moments later and just a short distance from the scene of the crime, defendants were captured, and the victim spontaneously stated that they were two of his assailants. That viewing of defendants by the victim was not unnecessarily suggestive nor was it a denial of their due process. Moreover, even if that identification procedure could be characterized as unduly suggestive and thus tainted, it is well settled in such instances that the in-court identification may still be admissible if it had an independent origin arising from an uninfluenced observation of defendants. People v. Cook, 113 Ill. App. 2d 231, 252 N.E. 2d 29 (1969). The instant record clearly reveals that Riley had an excellent opportunity to view his assailants, and that his in-court identifications obviously were not influenced by his on-the-street identification. The court did not err in denying defendants' motion to suppress the in-court identifications.

Defendants next contend that they were not proved guilty beyond a reasonable doubt, arguing that the victim's descriptions of his assailants were uncertain and vague.

The sufficiency of an identification raises a question of the credibility of the witnesses which is a matter for the determination of the trier of facts, and his judgment will not be disturbed on review unless the evidence is so improbable or unsatisfactory as to create a reasonable doubt of defendants' guilt. People v. Holt, 124 Ill. App. 2d 198, 260 N.E. 2d 291 (1970). In the present case, defendants were identified not only by the victim, but also by the police officer. The police officer testified that when he arrived on the scene, the three assailants were five or six houses away, and he positively identified two of the men as defendants. Both eye-witnesses

were positive and unshaken in those identifications. And as we have noted, the victim particularly had an excellent opportunity to view his assailants. While his descriptions to the police were understandably general, given as they were during the chase, they were sufficient to support the conviction. We regard the discrepancies and inconsistencies in the testimony of the State's witnesses as to the victim's physical condition and as to the amount of money won at the races to have been insignificant. Defendants were apprehended immediately after the crime and near the scene. Defendant Tankson had in his possession seventy-six dollars, including a fifty dollar bill; defendant Reed had in his possession a pocket knife similar to that used in the robbery. They were positively identified by credible witnesses. Both defendants were proved guilty of robbery beyond a reasonable doubt.

The judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

DEMPSEY and McGLOON, JJ., concur.

No. 55172

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
Plaintiff-Appellant,	)	COOK COUNTY.
)	
vs.)	
)	
SEYMOUR LACOB,	)	HONORABLE
	)	ROBERT J. DOWNING,
Defendant-Appellee.	)	PRESIDING.

MR. JUSTICE MCGLOON delivered the opinion of the court:

Pursuant to Supreme Court Rule 604(a), the State appeals the discharge of defendant, Seymour Lacob, under the terms of Ill. Rev. Stat. 1969, ch. 38, pars. 103-5(b) and (e), the relevant sections of which provide in part:

(b) Every person on bail or recognizance shall be tried by the court having jurisdiction within 160 days from the date defendant demands trial unless delay is occasioned by the defendant,***

(e) If a person is simultaneously in custody upon more than one charge pending against him in the same county or simultaneously demands trial upon more than one charge pending against him in the same county, he shall be tried, or adjudged guilty after a waiver of trial, upon at least one such charge before expiration relative to any such pending charges of the period prescribed by sub paragraphs (a) (b) of this Section. Such person shall be tried upon all of the remaining charges thus pending within 160 days from the day on which judgment relative to the first charge thus prosecuted is rendered***

On appeal the State asserts that defendant was improperly discharged on May 26, 1970, in that he never made a proper demand for trial until January 12, 1970, and consequently the 160-day statute had not run.

We reverse.

In September of 1965 several indictments were returned charging defendant with various offenses. Defendant was arraigned, pleaded not guilty, and was released on bond. Continuances were granted on defendant's motion, by agreement of the parties, or by motion of the State without defendant's objection until November 3, 1969.

On November 3, 1969, defendant and his counsel appeared and answered the call, "The defendant is here and ready." The State was not ready to proceed because of a change of personnel

assigned to handle the matter. Defendant's attorney was upset about this, and he informed the court that when he was first given notice of the personnel change three days earlier, he told the State's Attorney that had previously handled the indictments, "*** of necessity I would have to enter a demand for trial. Very frankly, this would be the first demand." However, a formal demand was never made, and the case was continued by motion of the State until January 12, 1970.

On January 12, 1970, the State asked for a continuance due to another reassignment of personnel working on the case. Defendant's counsel was, once again, upset at the delay and stated to the court, "Heretofore, Your Honor, there have been no demands for trial***"

When the court then inquired, "Are you demanding trial?", defendant's counsel answered, "Yes, Your Honor." The court later stated without objection of parties or counsel:

As far as the record in this case is concerned, a demand for trial by both defendants, Scymour Jacob and Wilbur Johnson, is of record as of today. The 160 days is now starting to run so far as the Court is concerned. That applies to all of them. Let's set a date for trial.

The case was continued until March 30, 1970, on motion of State.

On March 30, 1970, the case was continued to April 13, 1970, on motion of State. Another continuance was allowed the State setting May 5, 1970, for trial. When the matter was called May 5, defendant was not present, because he had supposedly surrendered to federal authorities to begin serving sentence for income tax evasion. However, it was demonstrated to the court that defendant was not in federal custody on that date, and the court forfeited defendant's bond. The court then continued the matter to May 25, 1970.

On May 25, 1970, the matter was continued to the following morning to allow defendant to appear in court. When he appeared he moved for discharge under the Fourth Term Act. The court granted the motion reasoning that more than 160 days had elapsed since November 3, 1970, when defendant appeared and answered ready for trial,

and further, that all subsequent delays were occasioned by the State. The State appeals the discharge.

The various sections which defendant relies on (Ill. Rev. Stat. 1969, ch. 38, pars. 103-5(b) and (c)) require that a demand be made by a defendant in order that the Fourth Term Statute commence to run. As was stated by this court in Village of Midlothian v. Wolling, 118 Ill. App. 2d 358, 255 N.E. 2d 23 (1969) at page 363:

Such demand must be communicated [to the court] "preferably by written notice, but certainly by a formal motion which is preserved in the record." See People v. Rockett, 85 Ill. App. 2d 24, 28, 228 N.E. 2d 219.

A careful examination of the record of November 3, 1969, shows that no oral or written demand for trial was made on that date. Defendant answered "here and ready" for trial, and while such a posture would be necessary should a demand be made, the fact of readiness does not, of itself, constitute a formal demand for trial. At most, defendant's counsel informed the court that he had made the applicability of the Fourth Term Act known to the State's Attorney when he conversed with him three days earlier.

The record of the January 12, 1970, proceedings strengthens our view. At that time a demand of record was made, but only after defendant's counsel informed the court that no demand had been made previously. Furthermore, no objection was made when the court reaffirmed this latter statement. We do not imply that a valid demand made on November 3 could be waived by counsel's statements at a subsequent time as to the validity of the demand. We only use the language of January 12 to illustrate the fact that no demand had previously been made, a fact which is clear from the record.

Because the requisite 160 days had not elapsed between defendant's demand for trial on January 12 and his discharge on May 26, the discharge was improper.

JUDGMENT REVERSED

McNAMARA, P.J., and DEMPSEY, J., concur.

55484

ABST.

PEOPLE OF THE STATE OF ILLINOIS,)	
	)	APPEAL FROM THE CIRCUIT
Plaintiff-Appellee,	)	COURT OF COOK COUNTY.
)	
vs.)	
)	
DALE SLAUGHTER,	)	Hon. Richard J. Fitzgerald,
	)	Presiding.
Defendant-Appellant.)	

MR. JUSTICE GOLDBERG delivered the opinion of the court:

Upon a hearing on revocation of probation, Dale Slaughter (defendant), was sentenced to the penitentiary for a term of one to ten years. By this appeal, he raises the sole issue that the trial court erred in imposing a maximum sentence ten times greater than the reasonable minimum.

Defendant has no previous record of conviction. When he was 21 years old, he was indicted for burglary. While awaiting trial, he was committed to the Elgin State Hospital for alcoholism. On January 9, 1968, he pleaded guilty. The value of the property involved was \$150. He requested and received an examination and hearing as to his competency but was found competent to stand trial. At that time, the court admitted him to probation for three years on condition that he return to the State Hospital for further treatment.

Some two years later, on January 15, 1970, after full hearing, his probation was revoked and the sentence appealed from was entered. The State's attorney recommended a sentence of from two to five years in the penitentiary. The trial court, however, imposed a reduced minimum sentence of one year and an increased maximum of ten years. The probation was terminated because defendant was convicted in July of 1969 of falsifying a stolen car report for which he was sentenced to ten days in

the County Jail of DuPage County. Also, he had pleaded guilty to contributing to the delinquency of a 14 year old boy by giving him beer to drink, for which he was sentenced to serve 30 days in the DuPage County Jail on weekends only.

Illinois courts have formulated the basic guidelines which govern the exercise of our authority to reduce the sentence solemnly pronounced by the trial court. 43 Ill.2d R.615 (b)(4). We have carefully reconsidered the salutary principles so well set out in these decisions. *People v. Hampton*, 44 Ill. 2d 41, 48 citing *People v. Taylor*, 33 Ill.2d 417 and *People v. Smith*, 14 Ill.2d 95; *People v. Holmes*, 127 Ill.App.2d 209, 214; *People v. Glasgow*, 126 Ill.App.2d 82, 90.

On the other hand, it is our duty to make certain that the sentence in each case is actually proportionate to the nature of the offense involved. *People v. Turner*, 129 Ill.App.2d 24, 27. We may not overlook the basic purposes of the imposition of minimum and maximum sentence as set forth in the repeatedly cited decision of *People v. Lillie*, 79 Ill.App.2d 174. As so effectively pointed out by the court in that case, "Adequacy of the punishment should determine the minimum sentence, with the maximum dependent upon the court's divination as to the length of time required to achieve rehabilitation." 79 Ill.App.2d 174 at 178.

It has frequently been held that a maximum sentence three times as long as the imposed minimum is a proper guide to be used by the trial court. *People v. Jones*, 92 Ill.App.2d 124; *People v. Lillie*, 79 Ill.App.2d 174. It has been well said that courts should not be bound strictly to this formula as it is merely a guide and not an inflexible rule. See *Abernathy, Sr. v. People*, 123 Ill.App.2d 263, 273. The problem to be solved is a determination or, rather, a divination of the length of time that it will take to bring about rehabilitation of the defendant. In

the case at bar, we cannot forget that defendant is a young man who is being punished for his first offense. The subsequent conduct which caused revocation of his probation has no bearing upon this sentence. People v. Turner, 129 Ill.App.2d 24, 26; People v. Livingston, 117 Ill.App.2d 189, 192; People v. Smith, 105 Ill.App.2d 14.

It seems to us that the problems encountered by this defendant are caused primarily by alcoholism. If this dangerous weakness is overcome, his rehabilitation should follow. In view of all the circumstances here, we feel that the sentence imposed should be affirmed. The reduction of the minimum sentence by the trial court reflects his complete understanding of all of the mitigating circumstances in this case.

The judgment and sentence are accordingly affirmed.

Judgment affirmed.

BURKE, P. J. and LYONS, J. concur.



MAR 20 1972

2 I.A.³ 116

ABST.

54640

JOHN NOYOLA, JR.,

Plaintiff-Appellant,
Counter-Defendant,

v.

RUTH LAURA NOYOLA,

Defendant-Appellee,
Counter-Plaintiff.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

Honorable Fred G. Suria, Jr.,
Presiding.

MR. JUSTICE DIERINGER delivered the opinion of the court:

This is an appeal from an order of the Circuit Court of Cook County, denying the plaintiff the right of visitation with his child. The matter is before us on the plaintiff's brief and the trial record only, since no abstract or defendant's brief was filed. The attorney for the defendant died without filing a brief. The defendant was notified in writing, by the clerk of this court on July 8, 1971, that no brief had been filed on her behalf, and unless the same was done within a short date, the court would proceed on the record before it. She immediately responded that she wished to employ other counsel to represent her, but no such action was taken. Three months having elapsed, it was the intention of this court to proceed with the disposition of the case on the record, however, upon referring to the trial record, it appears the section entitled "Report of Proceedings" is merely a narrative of the proceedings without any certification by anyone or the approval of the Circuit Court. Neither has there been any stipulation as to the authenticity of this purported "report of proceedings."

Therefore, in the absence of a properly certified report of the proceedings pursuant to Supreme Court Rule 323, there is nothing before this court of which we may take cognizance, and we are required to assume the evidence heard by the trial court was sufficient to support the order entered. Cosmopolitan National

Bank of Chicago v. Wheeler, 82 Ill. App.2d 462 (1967); Lambert v. Dabbs, 302 Ill. App. 400 (1939).

The judgment of the Circuit Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

ADESKO, P.J. and BURMAN, J., concur.

Abstract only.



ABST.

MAR 20 1972

2 I.A.³ 158

PEOPLE OF THE STATE OF ILLINOIS,)

Plaintiff-Appellee,)

v.)

LAWRENCE FIORENTINO,)

Defendant-Appellant.)

Appeal from the Circuit

Court of Cook County.

Louis B. Garippo, AJ.

MR. JUSTICE DEMPSEY DELIVERED THE OPINION OF THE COURT:

Lawrence Fiorentino was charged with knowingly permitting premises under his control to be used as a gambling place in violation of Ill.Rev.Stat., 1967, ch. 38, para. 28-3. He was found guilty and fined \$90. He contends that he was not proven guilty beyond a reasonable doubt.

Armed with a search warrant, officers of the Chicago Police Department's gambling unit entered a coffee shop at 306 South Halsted Street. Fiorentino was behind the counter and four or five patrons were seated at tables. One of these, Faye Truppa, placed a piece of paper inside a newspaper when she saw the police come in. Five or six pieces of paper which had written on them names of horses, race tracks and amounts of money were on the counter under a cigar box. Other indicia of betting, including "scratch sheets," were found in or near a telephone booth which was

adjacent to the counter. Fiorentino, who was picking up a soft drink bottle when the police entered, neither admitted nor denied that he was in charge of the premises.

Fiorentino and Mrs. Truppa were arrested and tried together. The trial was preceded by a motion to suppress the betting slips found on the counter and in Mrs. Truppa's newspaper. The motion was sustained as to her and she was discharged.

Mrs. Truppa testified for Fiorentino. She said there were twelve tables in the coffee shop and that three men were seated at them. The three men were playing cards. When asked what she was doing there she replied she was having coffee. When asked who served her, she said she brought in her own coffee from the outside. She testified that Fiorentino was not in charge the day he was arrested and that she had never seen him in control of the premises.

Fiorentino testified that he never saw the betting slips prior to his arrest; that 306 South Halsted Street was not his property and he stopped there only to eat a sandwich which he brought in from the outside. He explained his presence behind the counter by saying he went there to get a bottle of root beer to drink with his sandwich. When asked whom he had paid, he said he put the money in the register.

It was the State's burden to prove that the premises were used for gambling, were under the defendant's control and were knowingly permitted by him to be used for gambling purposes. The betting slips on the counter and the gambling paraphernalia close by were sufficient to establish that the premises were used for gambling.

The proof that the premises were under the defendant's control and that he knowingly permitted them to be used for gambling rested upon circumstantial evidence. Circumstantial evidence is competent evidence and is accorded the same weight and effect as direct evidence. A conviction based on circumstantial evidence will be sustained if the evidence is sufficient to establish guilt beyond a reasonable doubt.

To warrant a conviction on circumstantial evidence alone, the evidence must so thoroughly establish guilt as to exclude any reasonable hypothesis of innocence. The defendant argues that since his presence in the coffee shop can be explained on a hypothesis of innocence, this court must accept that explanation.

The mere fact that the defendant's testimony conflicts with the State's evidence and the inferences which can be drawn from that evidence, does not require the application of the hypothesis of innocence rule. People v. Garcia, 95 Ill.App.2d 34, 238 N.E.2d 87 (1968). The defendant was behind the counter when the police

came in. That he happened to be picking up a soft drink bottle at the time did not compel the exclusion of other inferences as to what he was doing there. Records of recent betting were on the counter and other gambling material was within reach. He did not deny that he was in charge of the shop and no one else in authority was present. The other people in the shop were seated at tables in the public area. If he was not in control, the wide-open place was operating without a manager and continued without one as long as the police were there. His testimony that he was just a customer, that he paid for the soft drink by putting his money in a cash register over which he had no authority and that he intended to drink the beverage with a sandwich purchased at a nearby restaurant, was not believed by the court. The State's case was bolstered, not weakened, by the inherent improbabilities of his testimony and that of his witness. The testimony of a witness may contain its own impeachment and may be so improbable as to be disregarded. People v. Gardner, 35 Ill.2d 564, 221 N.E.2d 232 (1966).

When a defendant is tried without a jury, the trial judge must determine questions of truthfulness and a court of review will not substitute its own conclusion as to guilt or innocence unless the proof is so unsatisfactory as to justify a reasonable doubt of guilt. People v. Smith, 50 Ill.App.2d 361, 200 N.E.2d 748 (1964). The finding of guilty was in accord with the evidence and the judgment is affirmed.

Affirmed.

55021



2

MAR 26 1972
I.A. 163

SUSIE LEWIS,

Plaintiff-Appellee,

v.

LICENSE APPEAL COMMISSION OF THE
CITY OF CHICAGO, et al.,

Defendants-Appellants.)

) APPEAL FROM
) CIRCUIT COURT
) OF COOK COUNTY.

) HONORABLE
) EDWARD J. EGAN,
) PRESIDING.

ABST.

MR. JUSTICE DRUCKER delivered the opinion of the court:

This was a proceeding under the Administrative Review Act to review the findings and order of the License Appeal Commission of the City of Chicago. The Local Liquor Control Commissioner revoked the plaintiff's local liquor license and this order was affirmed by the License Appeal Commission. On administrative review the Circuit Court set aside the order of revocation. The defendants are appealing from that decision.

Two charges were filed against plaintiff, one for permitting solicitation of a patron by and through her agent, Frank Lewis, and the other for assault with a deadly weapon by and through her agent, Ellis Montgomery.

The evidence discloses that on September 30, 1968, at 11:55 P.M. Officer Marion Williams (hereafter Williams) entered appellee's tavern at 4300 South Drexel Boulevard. He sat at the bar next to Gwendolyn Johnson (hereafter Gwendolyn) and had a conversation with her out of the hearing of the bartender who was Frank Lewis, plaintiff's son. Williams stated the following was his conversation with Frank Lewis:

I stated that Gwendolyn Johnson wanted to see him. I also stated to Frank Lewis that Gwendolyn Johnson offered to screw me for \$15. He stated, he didn't want to see that bitch, and stated for me to go for myself, baby.

Williams and Gwendolyn then went to her room where she picked

up a suitcase. They then entered Williams' car where he identified himself as a police officer and arrested her. Williams took Gwendolyn to the station and returned to the tavern with two other officers. He went into the tavern alone and had the following conversation with Lewis:

My exact words were closely to this:
"Frank, Gwendolyn wants to charge me \$20
and I don't have but \$15, to go screw her.
I need five more dollars so I can screw her."

Whereupon Lewis gave him \$5.

He further testified that he had met Lewis previously at the police station when Lewis complained about some people who had been smoking marijuana at his front door and that Lewis told him that he thought Williams was working under cover.

Frank Lewis' version of the alleged solicitation was substantially different. He testified that one month before the alleged solicitation he had complained to the police Vice Coordinator about gambling and "fellows speaking rough" in front of the tavern and was referred to Williams. Williams told Lewis there would be an undercover man and not to worry. Frank Lewis explained the five dollar loan as follows:

He said come here for a minute away from the lady I was with. He talked, he said I got to listen. I said, "What do you want?" He said he wanted \$5.00. And, the reason I gave it, he was sitting at the bar drinking and I thought he spent the money he had. So, I gave him \$5.00 and I sat back down.

Criminal charges were filed against Frank for solicitation and against Mrs. Lewis for being the keeper of a house of prostitution but were subsequently dismissed.

The evidence as to the charge of assault with a deadly weapon shows that on November 13, 1968, at 3:55 A.M. Officer Turner, while off duty in civilian clothes, entered licensee's tavern by the hotel entrance since the front door was locked. As he walked toward the bar he was approached by Ellis Montgomery,

a friend acting on behalf of plaintiff, when the following exchange took place according to Turner's testimony:

He told me they were closing. I continued to walk and I told him I only wanted a quart of beer to take out, get from the bartender. This man [Montgomery] followed me over there. I asked the bartender did he have carryouts and -- This man told me that "Mister, I told you we can't sell carryouts."

So, I then said, "okay." I was standing by the machine to get some cigarettes. I was standing by the machine, "No, you can't." So, I said, "Does the machine work?" "Yes, the machine works, you can't buy anything we're closing."

So, I asked -- "seems you have a poor attitude for a businessman." "Regardless of that we're closing." So I said, "fine." We started to the door, I got to the door and the man, I said, "You still have a poor attitude for a businessman."

He reached in his side coat pocket, inside his pants rather, he pulls out a 38 revolver. Says, "If you don't get the fuck out of here I am going to shoot you." I said, "Mister, no cause for the gun, I am a policeman." I started -- reached to show him my star number. "Don't go in your pocket, you'll be a dead policeman, get the fuck out of the door."

So, I observed a squad car outside the tavern, had a traffic violator stopped. I told him, "All right, I'll be back and you'll be under arrest." He said some more and I walked off.

Turner then testified that he went out the door and walked up to a police car parked nearby. He asked the officer, Radison, to call a sergeant. He and Radison returned to the front door of the tavern and finding it locked, they went to the hotel door. They were re-admitted to the tavern by someone other than Ellis Montgomery. Upon entry the officers asked Montgomery if he had a gun. By this time a sergeant and a lieutenant arrived. Montgomery stated there were two guns registered to the tavern and that he did not know where they were kept. A subsequent search of the premises revealed only a holster.

Although Turner testified that Montgomery had placed the

evening's receipts in a safe in Turner's presence, Officer Radison testified that he saw Montgomery with the receipts in his hand and did not see him go to a safe.

Montgomery testified that he did not have a gun. His version of the parting with Turner was as follows:

I came to the door and he said he was going to call the police and I told him I was going to call the police. And, he said if I wanted to, because he was going to call them.

As he went out this squad parked, and the car, he stopped the squad, and I called the station.

Criminal charges against Ellis Montgomery were dismissed.

Opinion

The defendants first contend that plaintiff's complaint for administrative review should have been dismissed for failure to file the complaint within 35 days after service of the final decision of the License Appeal Commission. The relevant statutes are:

Ill. Rev. Stat. 1969, ch. 110, par. 267:

Commencement of action.] Every action to review a final administrative decision shall be commenced by the filing of a complaint and the issuance of summons within 35 days from the date that a copy of the decision sought to be reviewed was served upon the party affected thereby. The method of service of the decision shall be as provided in the Act governing the procedure before the administrative agency,
* * *

Ill. Rev. Stat. 1969, ch. 43, par. 154:

Service of copy of decisions of State commission - Rehearing.] A copy of the rule, regulation, order or decision of the State commission or the license appeal commission, in any proceeding before it, certified under the seal of said commission, shall be served upon each party of record to the proceeding before the commission and service upon any attorney of record for any such party shall be deemed service upon such party. Each party appearing before said commission shall enter his appearance and indicate to the commission his address for the service of a copy of any rule, regulation, order, decision or notice and the mailing of a copy of any rule, regulation or order of said commission or of any

notice by said commission, in said proceeding, to said party at such address shall be deemed service thereof upon such party. [Emphasis supplied.]

The only evidence of service was an affidavit that a copy of the decision had been mailed to plaintiff's attorney but it did not state the address.

Since the defendants did not produce any proof that a copy of the decision had been mailed in compliance with the statute, their motion to dismiss was properly denied.

Defendants' second contention is that the Commissioner's finding that plaintiff permitted solicitation for prostitution was not against the manifest weight of the evidence. They contend that the contradictory evidence makes the entire matter an issue of credibility. We do not agree.

Under Ill. Rev. Stat. 1969, ch. 43, par. 153, review is limited:

The review by the license appeal commission shall be limited to the questions:

(a) whether the local liquor control commissioner has proceeded in the manner provided by law;

(b) whether the order is supported by the findings;

(c) whether the findings are supported by substantial evidence in light of the whole record.

The evidence is uncontradicted that the alleged solicitation took place outside of Frank Lewis' hearing and without his knowledge. It is also uncontradicted that Frank Lewis knew Williams to be a police officer having sought his assistance in clearing gangs from the front of the tavern.

We find there was an absence of proof that plaintiff permitted solicitation for prostitution and affirm the court's reversal on that charge.

Defendants' third contention is that the Commissioner's finding that plaintiff, by and through her agent, assaulted a patron with a deadly weapon was supported by substantial evidence.

Defendants claim that Montgomery's actions came within the purview of Ill. Rev. Stat. 1969, ch. 38, pars. 12-1(a) and 12-2(a), which provide:

Par. 12-1(a) A person commits an assault when, without lawful authority, he engages in conduct which places another in reasonable apprehension of receiving a battery.

Par. 12-2(a) A person commits an aggravated assault, when, in committing an assault, he: (1) Uses a deadly weapon.

Under the evidence presented by defendants, Montgomery refused to sell Turner any beer or cigarettes a few minutes before closing time and Montgomery found himself in a nearly empty bar with a cash register full of money, an obligation under the law to close on time, in an area with a high crime rate, confronting a demanding, unreasonable person who refused to follow his direction to leave the premises. After Montgomery told Turner that if he didn't get out of the premises he would shoot him, Turner stated that he was a policeman. Montgomery still insisted that Turner leave. Turner saw a squad car stopped outside the tavern. He remarked: "All right, I'll be back and you'll be under arrest." He then left the tavern.

Turner did not testify that Montgomery pointed a gun at him. Defendants claim that the following testimony of Officer Radison establishes Montgomery's use of a gun:

Officer Turner approached me on the street and he identified himself as an officer and he told me that he was approached [sic]. He went to the lounge, 4300 Drexel to get a drink and that the bartender stated they were closing, refused him a drink. He then asked if he could buy some cigarettes. At this time the bartender refused him again and told him to leave the premises at gun point.

This testimony was clearly hearsay and not admissible in an administrative hearing. (Russell v. License Appeal Commission)

of the City of Chicago, _____ NE2d _____, Ill. App. First Dist.
No. 55092.)

Under these circumstances, we find no substantial evidence that Turner was placed "in reasonable apprehension of receiving a battery."

We therefore affirm the trial court's judgment.

AFFIRMED.

English, P.J., and Lorenz, J., concur.

Publish abstract only.



ABST.

54714

2

MAR 20 1972

I.A.³ 179

PEOPLE OF THE STATE OF ILLINOIS,)

Plaintiff-Appellee,)

vs.)

O'DELL MITCHELL,)

Defendant-Appellant.)

APPEAL FROM THE
CIRCUIT COURT
OF COOK COUNTY.

HONORABLE
HERBERT R. FRIEDLUND,
PRESIDING.

MR. JUSTICE LYONS delivered the opinion of the court.

Defendant has appealed from a finding of violation of probation.

On October 18, 1966, defendant entered a plea of guilty to a charge of theft [Ill.Rev.Stat. 1963, ch.38, par.16-1(a)] and was placed on five years probation. On August 25, 1969, defendant was brought before the court on a rule to show cause why his probation should not be terminated. At the hearing on the rule, the court determined that defendant had been convicted of criminal trespass to vehicles [Ill.Rev.Stat. 1967, ch.38, par. 21-2] on August 14, 1969, and thus terminated his probation and imposed a one to five year sentence.

Defendant's sole contention on appeal is that his violation of probation was not established by a preponderance of the evidence. We find no merit in this contention. The record of the hearing discloses that defense counsel expressly advised the court that defendant had indeed been convicted of criminal trespass to vehicles on August 14, 1969, and, in addition, defense counsel expressly stipulated as to that conviction. The State, of course, stood on that conviction as the basis for a finding of violation of probation. Hence the court had before it the following evidence of defendant's violation of probation: a detailed report from the Probation Department, the State's contention that defendant had been convicted of an offense

of probation, defense counsel's assertion that defendant had been convicted of an offense on August 14, 1969, and defense counsel's stipulation that defendant had been convicted of an offense on August 14, 1969. Under these circumstances we find no indication that the court's ruling was in any way improper. Indeed, the evidence presented by both sides clearly established that the probation violation had occurred. No contrary evidence whatsoever was submitted prior to the court's ruling. Accordingly, the judgment of the trial court is affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J. and GOLDBERG, J., concur.

54752



ABST. MAR 20 1972

2 I.A.³ 179

PEOPLE OF THE STATE OF ILLINOIS,)	APPEAL FROM
Plaintiff-Appellee,)	
)	CIRCUIT COURT,
vs.)	
)	COOK COUNTY.
IVORY ANDERSON,)	
Defendant-Appellant.)	HON. ROBERT J. SULSKI,
	Presiding.

MR. PRESIDING JUSTICE BURKE delivered the opinion of the court:

Defendant entered a plea of guilty to an information charging him with the crime of burglary. The trial court found the defendant guilty of the crime as charged in the information and sentenced him to a term of two years to two years and one day in the penitentiary. On appeal defendant's sole contention is that the trial court did not properly admonish him of the consequences of his plea of guilty, in that the court informed him that he could be sentenced on a plea of guilty to "an indeterminate number of years."

It appears from the record that after the trial court was advised by defense counsel that the defendant wished to enter a plea of guilty to the information, the court admonished the defendant with regard to the crime charged and with regard to the fact that defendant was waiving his right to a trial by jury by entering a plea of guilty. The court then went on to advise the defendant that if he entered a plea of guilty he could be sentenced to "a minimum of one year and a maximum of indeterminate number of years (sic)...." After defendant stated that he understood all that of which the court informed him and that he nevertheless wished to enter a plea of guilty, the trial court entered a finding of guilty as charged in the information.

In the recent case of *People v. Scott*, 43 Ill.2d 135, the defendant raised the same question on appeal as is raised here. The Supreme Court responded to the contention, at page 142 of that case:

"We have examined the record of the court's admonishment to the defendant at the time his pleas of guilty were accepted. In each case the court advised the defendant that upon a conviction of the crime of burglary he could be sentenced to the penitentiary for any number of years not less than one year. The defendant said that he understood this and told the court that he was pleading guilty because he was, in fact, guilty. This admonishment was sufficient."

Section 19-1 of the Criminal Code specifies that a person convicted of burglary shall be imprisoned in the penitentiary for any indeterminate term with a minimum of not less than one year. Ill.Rev.Stat. 1969, ch.38, par.19-1(b). The admonishment given to the defendant in the instant case conformed to the wording of the statute, precisely informing defendant of the consequences of his plea of guilty. See also Ill.Rev.Stat. 1969, ch.110A, par. 401(b); ch.110A, par.402(1970 Supplement.)

In the cases of *People v. Terry*, 44 Ill.2d 38 and *People v. Medley*, 122 Ill.App.2d 279, cited by defendant in support of his position, the defendants there were advised by the respective trial courts only as to the minimum term to which they could be sentenced upon a plea of guilty. Those cases are clearly inapposite to the factual situation in the instant case. See also *People v. Mackey*, 33 Ill.2d 436.

For these reasons the judgment is affirmed.

JUDGMENT AFFIRMED.

LYONS and GOLDBERG, JJ., concur.



54842

ABST.

MAR 20 1972

2 ILL. APP³ P. 185

PEOPLE OF THE STATE OF ILLINOIS,)

Plaintiff-Appellant,)

vs.)

HENRY DAVIS,)

Defendant-Appellee.)

APPEAL FROM THE
CIRCUIT COURT
OF COOK COUNTY.

HONORABLE
SIDNEY A. JONES,
PRESIDING.

MR. JUSTICE LYONS delivered the opinion of the court:

This is an appeal by the State from an order suppressing evidence.

The defendant, Henry Davis, was charged with unlawful use of weapons and unlawful possession of narcotics (marijuana) in violation of Ill.Rev.Stat. 1967, ch.38, pars.24-1(a-4), 22-3. Prior to trial defendant moved to suppress the weapon and the narcotics, alleging inter alia that there was no probable cause for his arrest. A full hearing on defendant's motion to suppress was conducted and thereafter the trial judge entered an order suppressing the evidence. On appeal from that order, the State advances two contentions: (1) that the trial judge erred by relying upon matters of personal knowledge and assumptions not based upon the evidence, and (2) that the trial judge erred by granting defendant's motion to suppress. A review of the evidence heard on the motion to suppress is necessary to an understanding of the case.

The defendant, Henry Davis, testified that he and two friends drove to an all-night grocery store in the 6300 block of Woodlawn Avenue, Chicago, about 4:00 A.M. on November 26, 1968. He parked his auto in a well-lighted city parking lot located about 50 feet from the store. He and one friend went into the store while the other friend remained in the car. According to defendant, he remained in the store for about three minutes and

then headed back to his car. Upon leaving the store he noticed a delivery man carrying a load of bread into the store. When defendant was about to enter the parking lot, two uniformed police officers in an unmarked car drove up and called to him. He walked toward the officers whereupon they got out of their auto and proceeded to search him. Defendant was wearing a full length leather coat and had been walking with his hands in his pockets. One of the officers patted him down, opened his coat and removed something from his left pants pocket. At no time did the officers ask him any questions or explain the purpose of the search.

Officer William Joyce testified that he and his partner were in the vicinity of 63rd Street and Woodlawn Avenue, Chicago, about 4:00 A.M. on November 26, 1968. The officers were apparently parked at the curb about fifty feet from the grocery store. Officer Joyce observed the defendant standing in a dark doorway a few feet south of the grocery store. The defendant was holding his right hand in his pocket at this time. The two officers were in plain view and could have easily been seen by the defendant. A bread truck pulled up in front of the store and the truck driver gathered several packages from inside the truck and went into the store. After the driver went into the store, Officer Joyce observed the defendant look in the window of the store and then quickly return to the doorway. The defendant still had his right hand in his pocket at this time. According to Officer Joyce, the truck driver came back out to his truck, gathered more packages and went back into the store. At that time the defendant peered into the window a second time and moments later ran back to the doorway with his hand still in his pocket. The truck driver again came out of the store and went back into the truck. The defendant apparently began moving toward the truck and, at that time, Officer Joyce and his partner walked up to the defendant and "made a frisk

of his person." Officer Joyce stated that he grabbed defendant's right hand, which defendant still had in his pocket, and felt what the officer believed to be a gun. Officer Joyce pulled defendant's hand out of his pocket and discovered that he was holding a gun in his hand. Defendant was then placed under arrest for carrying a concealed weapon and a search of his person was made. During the search the officers seized a brown envelope containing marijuana. Officer Joyce further stated that he stopped and frisked the defendant because he believed the defendant was about to commit a robbery.

Having heard the testimony of both the defendant and Officer Joyce, the trial judge granted the motion to suppress and, in so doing, made the following remarks:

Motion to suppress is sustained. There is [sic] no basis to arrest this man. * * * If a man can't put his hand in his pockets on a cold winter day we are in a pretty bad country. * * * Woodlawn at that spot is as bright as this courtroom is. This officer, with another officer with him, was at 6315, which is only a few doors from 63rd Street. This officer, sitting there. A bread truck is there. This man [defendant] looking and seeing two men who he would obviously assume were police officers. Two white men in a car facing him. You think he is going to commit a robbery there with these people looking right at him? It's absolutely absurd. It's absolutely ridiculous. There was absolutely no basis for the arresting of this man. Neat looking, respectable man. Motion to suppress is sustained. The defendant is discharged.

For its initial contention on appeal, the State argues that these remarks of the trial judge indicate that he relied upon matters outside the record. Specifically, the State alleges that there was no testimony concerning the weather, no testimony establishing how bright the arrest location was, no testimony supporting the judge's statement that defendant saw the two officers sitting in the police car, and no testimony indicating that defendant was neat and respectable appearing. We do not agree with the State's position in this regard. A careful examination of the record

indicates rather clearly that the judge's remarks, though not verbatim quotes from the testimony, were reasonable statements reflecting obvious inferences drawn from the evidence heard in open court. For example, the evidence established that defendant was arrested on November 26, 1968, at approximately 4:00 A.M., while he was wearing a full length, fully lined leather coat. The judge referred to the time of arrest as a "cold winter day." Certainly this characterization by the judge was not an unreasonable one in view of the evidence. The other remarks about which the State complains, with the exception of the one regarding defendant's appearance, find similar support in the record. So far as the remark about defendant's appearance is concerned, it seems patently clear that the judge was referring to the appearance which defendant presented in court during the motion to suppress hearing, and we are aware of no rule which prohibits such commentary by a trial judge. Hence, we find no evidence of prejudicial, reversible error in the trial judge's remarks.

For its second contention, the State argues that the police officers had probable cause to arrest defendant because the arrest was based upon the seizure of a weapon which they discovered during a legally valid search of defendant's person. The State relies upon *Terry v. Ohio* (1968) 392 U.S. 1, the so-called "stop and frisk" case, which held that in the interest of effective crime prevention and detection, a police officer may in appropriate circumstances and in an appropriate manner approach a person and conduct a limited search of his person for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest. See also *People v. Tassone* (1968) 41 Ill.2d 7. According to the State, the facts of this case establish that the officers had reasonable grounds to believe

that a citizen, the truck driver, was in danger of attack and, therefore, were fully justified in stopping and frisking the defendant. In its view of the facts, however, the State does not look beyond the substantive testimony of Officer Joyce, whereas the trial judge heard testimony from the defendant as well. Much of defendant's testimony regarding critical factors about the search and arrest was in direct conflict with that of Officer Joyce. The trial judge elected to resolve these conflicts in defendant's favor as he, the trier of fact, had the power to do. In our opinion, the findings of the trial judge were not so clearly unreasonable as to require a substitution of our judgment for his. See *People v. Haskell* (1968) 41 Ill.2d 25, 30.

Accordingly, for the reasons we have indicated, the judgment of the trial court is affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J. and GOLDBERG, J., concur.

55577

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	APPEAL FROM THE CIRCUIT
	)	COURT OF COOK COUNTY.
vs.)	
)	
ROBERT WOODALL and	)	Hon. Frank J. Wilson,
PATRICK SCHMITT,	)	Presiding.
)	
Defendants-Appellants.)	

MR. JUSTICE GOLDBERG delivered the opinion of the court:

Defendants Robert Woodall and Patrick Schmitt were jointly indicted for theft of an automobile valued in excess of \$150 (Ill.Rev.Stat. 1967, ch.38,par.16-1(a)(1)) and for criminal trespass to a vehicle (Ill.Rev.Stat. 1967, ch.38,par.21-2). Defendants were jointly tried by a jury and were each found guilty of both offenses. Upon their appeal, a preliminary question arises concerning the sentences imposed by the trial court.

The report of proceedings shows that the trial court sentenced defendant Woodall to a term of from five to ten years in the penitentiary and Schmitt was sentenced to a term of from one year to five years in the penitentiary. Because the crime of trespass to a vehicle is a misdemeanor, these sentences must be deemed to have been imposed pursuant to the verdicts and judgments of guilt of theft of the automobile exceeding \$150 in value. The common law record as certified to this court indicates that defendant Woodall was sentenced to a term of from five to ten years in the penitentiary for theft and to an identical term in the penitentiary for trespass to a vehicle, with these sentences to run concurrently. The record also shows that defendant Schmitt was sentenced to two concurrent terms in the penitentiary of from one to five years each for the same offenses.

Defendants first appealed directly to the Supreme Court of Illinois. The Supreme Court transferred the appeal to this court. In their brief, the People concede that the actual sentences announced by the court were accurately reflected in the report of proceedings and that the common law record was erroneous. On oral argument before this court, attorneys for defendants and the State's attorney stipulated that the common law record had been erroneously prepared and that the sentences actually entered were as reflected in the report of proceedings; namely, sentences for theft of an automobile in value of excess of \$150 with terms in the State Penitentiary of from five to ten years for defendant Woodall and from one to five years for defendant Schmitt. We will accept and act upon this stipulation. The reasons are manifold. First, the sentence for trespass to a vehicle as reflected in the common law record far exceeds the statutory maximum and the excess should be deemed void. *People v. Simpkins*, 48 Ill.2d 106, 111. Second, since both of the several sentences arise from identical acts, the conviction for the lesser crime of trespass to a vehicle should be reversed. *People v. Stewart*, 45 Ill.2d 310, 313; *People v. Torello*, 109 Ill.App.2d 433, 444. Third, as above shown, we are convinced that the trial court actually intended to and did sentence defendants for theft alone and not for the lesser offense.

Consequently, we accept the stipulation of counsel and we strike from the common law record the judgments and sentences which pertain to the verdicts of guilty of criminal trespass to a vehicle. We consider that defendant Robert Woodall is sentenced only to a term of from five to ten years in the penitentiary for theft and defendant Patrick Schmitt is sentenced only to a term of from one to five years in the penitentiary for theft. We will now proceed to review these sentences in accordance with the arguments presented.

In attacking their sentences for theft of an automobile, defendants raise two points. They contend that the evidence was insufficient to sustain their convictions and also that the trial court erred in admitting into evidence for impeachment an exemplified copy of a prior conviction of defendant Woodall in Indiana. We will first summarize the evidence.

A witness for the People testified that he owned a 1966 Chevrolet for which he had paid \$3500. At 11:30 p. m. on March 22, 1969, he parked his automobile outside his apartment on Berteau Street in Chicago. Subsequently he left home and returned at approximately 12:45 a. m. to discover that his car was missing. He had not given anyone permission to use the vehicle. He testified that the automobile was not damaged and that the windows were rolled up and doors locked.

Two police officers testified that at approximately 1:30 a. m. on March 23, 1969, they noticed a parked car in the 1300 block of Montrose in Chicago and saw a man's head move downward in the vehicle. They found defendants Woodall and Schmitt crouched in the front floor of the car and heard one of the defendants say, "I'll get these wires fixed yet." Woodall was handling the dangling ignition wires. The right vent window mechanism was broken and the window was loose. Woodall explained his presence in the car by stating that it belonged to a friend, a Johnnie Long, who was across the street trying to locate his wife who had the keys to the car. Defendants testified that they were helping a friend move some furniture. They were crouching in the car because the ignition wires had been hanging down and when they entered the auto Woodall inadvertently kicked the loose wires causing sparks and smoke. They opened the windows to let the smoke out of the car and crouched down to keep warm.

Other officers arrived on the scene but were unable to locate defendants' friend. The police waited 20 minutes but no one approached the car. They searched the vehicle, found papers with the owner's name in the glove compartment and took defendants to the police station. At the station, the police called the owner, learned that his car had been stolen and placed defendants under arrest.

It is established in Illinois that the recent, exclusive and unexplained possession of a stolen automobile by an accused gives rise to an inference of guilt of theft thereof, absent other facts or circumstances which may create a reasonable doubt. *People v. Moore*, ___ Ill.App.2d ___, 264 N.E.2d 582, 584; *People v. Jones*, 112 Ill.App.2d 464, 467; *People v. Smith*, 107 Ill.App.2d 267, 269, 270.

Defendants urge that they were not in exclusive possession or control of the auto and therefore no presumption of guilt of theft can be inferred from their presence in the stolen car. They rely upon *People v. Barnes*, 311 Ill. 559 and *People v. Davis*, 69 Ill.App.2d 120. In *Barnes*, defendants were merely passengers in a stolen auto. They did not have exclusive possession or control of the vehicle. In *Davis*, the accused was not actually seen in the stolen vehicle or getting out of it. He was "along side" or "a couple of feet" behind it when he was apprehended. See 69 Ill.App.2d 120 at 125, 126. These cases are not relevant.

Defendants themselves testified that they were discovered while crouched under the dashboard on the front floor of the car. The fact that the defendants were not seen actually driving the car and their apparent inability to start the car when apprehended are insufficient to raise a reasonable doubt of guilt. *People v. Smith*, 107 Ill.App.2d 267, 270; *People v. Nunn*, 63 Ill.App.2d 465, 471.

Further, where a defendant is found in exclusive possession of a stolen vehicle and attempts to explain this fact, he must tell a reasonable story or be judged by its improbabilities. *People v. Moore*, ___ Ill.App.2d ___, 264 N.E.2d 582, 584; *People v. Bullock*, 123 Ill.App.2d 30, 34; *People v. Smith*, 107 Ill.App. 2d 267, 270. Here the defendants attempted to explain their presence in the auto by referring to the mysterious Johnnie Long. No corroborative evidence was introduced which would indicate that such person existed. The credibility of the witnesses is for the jury and in this case the jury chose not to believe the defendants. It cannot be said these verdicts are against the manifest weight of the evidence. On the contrary, the verdicts of guilty of theft of a motor vehicle as to each defendant are amply supported by the evidence beyond reasonable doubt.

Defendants' second contention is that the trial court erred in admitting in evidence, for impeachment purposes only, a duly exemplified copy of defendant Woodall's conviction on March 11, 1965 for theft in Indiana. The subject of this theft was property valued at \$20. Defendants argue that since the State failed to introduce an authenticated copy of another prior theft conviction, which would make the Indiana theft offense an infamous crime in Illinois, the exemplified copy of the Indiana conviction was improperly admitted.

Defendants concede that an authenticated copy of a conviction for an infamous crime is admissible to affect the credibility of a defendant who testifies in his own behalf. *People v. Bey*, 42 Ill.2d 139, 146; *People v. Humphrey*, 129 Ill.App.2d 404, 413; Ill.Rev.Stat. 1969, ch.38, par.155-1. In this case, the exemplified evidence was competent under the most recent requirements announced by the Supreme Court of Illinois. *People v. Montgomery*, 47 Ill.2d 510. Defendants also concede that to determine whether defendant Woodall's Indiana conviction can be introduced in

Illinois for impeachment purposes, we must look to the nature of the offense in the foreign jurisdiction and determine whether the crime, if committed in Illinois, would be an infamous crime. *People v. Witherspoon*, 27 Ill.2d 485-86; *People v. Trent*, 85 Ill.App.2d 157, 162.

Under Illinois law, Woodall's Indiana conviction for theft of property valued at \$20 would be an infamous crime if it were a second offense. (See, Ill.Rev.Stat. 1969, ch.38,par.16-1, and Ill.Rev.Stat. 1969, ch.38,par.124-1). Prior to his Indiana conviction on March 11, 1965, defendant Woodall had a lengthy criminal record, including convictions for petty larceny, burglary, petty theft and attempt theft. Thus, had defendant committed the Indiana theft in Illinois he would have been subject to a penitentiary term of from one year to five years. This would make the conviction an infamous crime in Illinois and the exemplified evidence thereof would be admissible to impeach Woodall's credibility.

Defendants argue, however, that the trial court erred in considering unauthenticated records of Woodall's prior convictions in determining the admissibility of the 1965 Indiana conviction. Defendants cite *Bartholomew v. People*, 104 Ill. 601 for this proposition. This case is inapplicable. In *Bartholomew*, it was held error to admit in evidence before the jury extraneous matters such as the mittimus. The court held that only the certified copy of defendant's conviction for an infamous crime could be admitted. In the case at bar, reports from the Federal Bureau of Investigation and from the Chicago Police Department were exhibited to the trial court out of the presence of the jury as substantiation of previous convictions of defendant Woodall but these matters were not offered into evidence. They were never seen by the jury. They were merely examined

by the judge to determine whether the duly exemplified copy of defendant's 1965 Indiana conviction reflected an infamous crime and was therefore admissible for impeachment purposes.

The situation here hardly differs from any voir dire hearing or the hearing on any motion out of the presence of the jury. Since there is no showing or contention that the conclusion reached by the trial court regarding previous convictions is factually erroneous, it should be accepted and used, as it was, for impeachment purposes only. We conclude that it was proper to receive the exemplified copy of the previous conviction in evidence.

In addition, our examination of the record shows that when the exemplified copy of the Indiana conviction was about to be read in evidence, the parties stipulated by their counsel that these records, "be entered into evidence." Although this point is not raised or argued in the briefs of either side, if such stipulation did exist, it would constitute a binding and effective waiver of the objection. See *People v. Jones*, 47 Ill.2d 135, 140; *People v. Stanbeary*, 126 Ill.App.2d 244, 253. As a final matter, the evidence of the prosecution is so strong, as contrasted to the improbable and illogical story recited by defendants, that it is difficult to conceive of any verdict being returned by a jury in this case other than guilty, regardless of the presence or absence of the exemplified copy of the Indiana proceedings. The exemplified copy was only for purposes of impeachment and defendants' stories carried within themselves their own impeachment so that they served only to strengthen the prosecution. If any error existed, and if it was not waived by the stipulation, it was completely harmless. See, *People v. Rosochacki*, 41 Ill.2d 483, 494; *People v. Ridener*, 129 Ill.App.2d 105, 107; *People v. Thompson*, 128 Ill.App.2d 420, 426.

We therefore conclude, and it is accordingly directed, that the sentences of defendant Robert Woodall to the penitentiary for a term of from five to ten years, and of defendant Patrick Schmitt to the penitentiary for a term of from one to five years are both affirmed.

Judgments and sentences for
criminal trespass stricken.
Judgments for theft affirmed.

BURKE, P. J. and LYONS, J. concur.

ABST.

2 I.A.³ 303

54573

STERLING SAVINGS AND LOAN ASSOCIATION,)	
an Illinois corporation,)	
)	
Plaintiff-Counter-	)	APPEAL FROM THE
Defendant-Appellee,	)	CIRCUIT COURT
	)	OF COOK COUNTY.
vs.)	
)	
JOSEPH F. GIAMPA, RITA M. GIAMPA, his)	
wife; JOHN B. ADAMO, JR., and	)	HONORABLE
CATHERINE G. ADAMO, his wife,	)	WALTER P. DAHL,
	)	PRESIDING.
Defendants-Counter-)	
Plaintiffs-Appellants.)	

MR. JUSTICE LYONS delivered the opinion of the court:

This is an appeal from a decree of foreclosure entered pursuant to the trial court's allowing plaintiff's motion for summary judgment on both the complaint for foreclosure and defendants' counterclaim.

In this court the defendants contend first that the trial court lacked jurisdiction to proceed with the cause since "unknown owners" were named as parties defendant in the complaint but were not served by publication as provided for in sections 14 and 15 of the Civil Practice Act (Ill.Rev.Stat. 1967, ch.110, pars. 14 and 15). Defendants' second and final contention is that the entry of summary judgment was improper as there existed genuine issues of material fact to be determined following the taking of evidence.

In support of their first contention defendants rely upon the proposition that when a court becomes aware that a necessary party to the litigation has been omitted, it should proceed no further until the omission has been cured. That being the case, defendants conclude that if this court should agree that a necessary party was omitted below, the decree entered below should be deemed to have been entered by a court without authority to do so. Further, if we should agree that a necessary party was omitted, we should dismiss the appeal. The trial court would have

plenary jurisdiction of the cause and would be required, in accordance with our finding, to order that the omitted party be added.

Our resolution of the question of whether a necessary party to the instant litigation was omitted must be based solely upon the record before us. The record contains no substantive material which would indicate to us that the defect of which defendants complain exists. Defendants contend however, that the fact that the complaint designates "unknown owners" as parties defendant is conclusive as to their existence and that their omission as parties through plaintiff's failure to serve them by publication effectively precluded the possibility of the trial court's proceeding with the cause until publication was had. We do not agree.

Neither the language of the complaint nor that of the affidavit for unknown owners filed in accordance with the provisions of section 29 of the Civil Practice Act (Ill.Rev.Stat. 1967, ch.110, par.29) can be construed as placing either the trial court or this court on notice that there are in existence additional parties who are necessary to the proper conduct of the instant litigation. Neither the complaint nor the affidavit avers the existence of such parties. Rather, both are couched in language indicative of plaintiff's uncertainty on the point. As noted above, the record contains nothing to indicate that such parties do in fact exist, and thus we have no basis upon which to found the conclusion for which defendants opt; i.e., that the trial court was put on notice that a necessary party had been omitted through the failure to serve him by publication. Even if we were able to conclude that the trial court must have known that a necessary party had been omitted, it need not follow that the trial court's decision to proceed was error. The question of

whether to proceed with the cause absent a necessary party must be determined by the trial court in exercising its sound discretion (see *Rose v. St. Louis Union Trust Co.* (1968) 99 Ill.App. 2d 81, 241 N.E. 2d 16). Defendants have failed to establish that they were prejudiced by the court's election. That being the case, we cannot say that the trial court abused its discretion.

Finally, in view of the failure of the record to support the proposition that unknown owners do in fact exist, we have decided to exercise the authority conferred by Supreme Court Rule 366 (a)(2) Ill.Rev.Stat. 1969, ch. 110A, sec.366 (a)(2) and allow plaintiff's motion to dismiss unknown owners as parties defendant.

There appears to be no dispute between the parties with respect to the law applicable to the second point raised on appeal concerning the propriety of allowing the motion for summary judgment. The sole question presented is whether the pleadings, affidavits filed in support of and in opposition to the motion, and discovery deposition of the defendant Joseph F. Giampa present a question of material fact. Defendants do not contend that the pleadings alone raise a material issue of fact. Thus, they need not be detailed here. Neither do they contend that the addition to the pleadings of their counsel's affidavit filed in opposition to the motion operates to raise a fact issue. They do contend that the discovery deposition of Joseph F. Giampa, offered by plaintiff in support of the motion for summary judgment, indicates that a question of fact exists as to the capacity in which Joseph Testa, president of the seller, Lawrence River Construction Company, and of the plaintiff corporation, dealt with the defendants. Defendants' entire defense and counterclaim are based upon the proposition that Testa dealt with the defendants as president of plaintiff corporation and that therefore promises alleged to have been made by him to the defendants were the obligations of the

plaintiff (e.g., clearing all objections to title, delivery of a warranty deed and owner's title insurance policy, providing right of quiet enjoyment and warranty of title) which plaintiff has failed to perform.

We have reviewed the deposition carefully and have failed to find anything upon which even a reasonable inference might be drawn concerning the possibility that Testa acted in his capacity as an officer of the plaintiff in his dealings with the defendants. On the contrary, we find that the only reasonable conclusion which can be drawn from Giampa's discovery deposition is that the defendants' only dealings with Testa involved the negotiation of the purchase of the property from Lawrence River Construction Company. We must therefore reject defendants' contention that the trial court erroneously entered summary judgment for the plaintiff and affirm the decree.

DECREE AFFIRMED.

BURKE, P.J. and GOLDBERG, J., concur.



ABST.

MAR 20 1972

54775

2 I.A.³ 304

PEOPLE OF THE STATE OF ILLINOIS,)
Plaintiff-Appellee,)
vs.)
CHARLES W. JOHNSON,)
Defendant-Appellant.)

APPEAL FROM THE
CIRCUIT COURT OF
COOK COUNTY.

HONORABLE
MINOR K. WILSON,
PRESIDING.

MR. JUSTICE LYONS delivered the opinion of the court.

The defendant, Charles W. Johnson, was charged with armed robbery in violation of Ill.Rev.Stat. 1967, ch. 38, par.18-2. Following a bench trial, defendant was found guilty and was sentenced to serve not less than two nor more than four years in the Illinois State Penitentiary.

On appeal defendant contends that his guilt was not proven beyond a reasonable doubt. Hence, the evidence adduced at trial must be reviewed.

Only one witness, Claude Anderson, a registered pharmacist, testified at trial. During direct examination, Anderson stated that he was working at Porter's Prescription Laboratory, 3541 South State Street, Chicago, on January 15, 1968, at about 4:30 P.M. Anderson was busy at the prescription counter when Lottie Washington, a co-employee, who was working in another part of the store, called to him. In Anderson's words:

I knew what it was by her voice. I went down there and a man stuck a gun in my face and said, 'Give me all the money you got.' I opened the register and told him to take it. He said, 'No, you hand it to me.' I handed it to him. He said, 'Empty your pockets.' I said, 'There is nothing in my pockets.' He said, 'Open your wallet.' I had \$19 in the wallet. * * * I gave it to him. Then he said, 'Come on in the back.' * * * He said, 'Open the safe.' I said, 'It is already open, nothing in the safe.' So then my assistant had her bag sitting up on top of the safe, so he reached in there and took money out * * *. She had to lay flat on the floor, face down, don't [sic] move, and then he left. [He took a total of] around \$351, \$361 * * *.

At the time of the robbery, Anderson recognized the robber as a prior customer of the store but did not know his name. The lighting conditions in the store were quite good and Anderson observed the robber for some five minutes during the course of the robbery. On at least one occasion the robber stood face to face with Anderson at a distance of 12 inches. Anderson again saw the robber in the store on April 3, 1968 and he phoned the "detective on the case." The detective put the store under surveillance and the next day, when Anderson again saw the robber come into the store, the arrest was made. Anderson made an in-court identification of the defendant, Charles Johnson, as the robber. Asked whether he was positive that the defendant was the man who had robbed him in January, Anderson replied: "I am positive that is the man. There can be no mistake."

On cross-examination, Anderson stated that after the robbery he sprung the ADT alarm and "ran out to see which way he [the robber] went so I could tell the police which way he went. I chased right up to the corner of 36th Street and he ducked under the el." When the police arrived, Anderson described the offender as being six feet two or three inches tall and weighing about 180 pounds. He admitted that his estimate of defendant's height might have been erroneous because he was a poor judge of height. Anderson also stated that the defendant came into the store on two separate occasions the day before his arrest. In addition, Anderson stated that defendant attempted to rob him a second time on or about February 17, 1968, but was unsuccessful. Anderson was then asked several questions concerning Lottie Washington, his co-employee at the time of the robbery. He testified that Lottie Washington was no longer employed at the pharmacy because "she was so scared she quit that night [of the robbery]." When asked whether Miss Washington had ever been contacted to

testify in the case, Anderson replied: "I don't know. She said she won't testify. She was so scared she didn't know who it was."

On redirect examination, Anderson was asked to elaborate concerning the attempted robbery which had occurred in mid-February 1968. Anderson stated: "Well he [the defendant] stuck a gun and said, 'Give me all the money you got in the store.' I said, 'What, you again.' I had the store arranged in such a way that he failed." Anderson indicated that he was positive that it was Charles Johnson, the defendant, who had robbed him in January and who attempted to rob him again in February.

On recross examination, Anderson testified that he wore eyeglasses and had them on at the time of the robbery. The State then rested its case.

A defense motion for a directed verdict was denied and the court heard rather extensive closing arguments. Upon the conclusion of closing arguments, the court made the following findings:

* * * I do believe him [Claude Anderson] and I don't have a reasonable doubt on any of the issues in this case. There are really two issues in this armed robbery case. One is that a man came in and threatened another with what appeared to be a pistol, and he took from this man by putting him in force and fear the sum of \$51 and it seems to me, it is pretty clear in this case, even though it is what we would call a one witness case or a one finger, I don't have reason to disbelieve Mr. Anderson when he says that the defendant is a person who was well known to him, who had been in the store a number of times before. It is a most peculiar conduct, I admit, on the part of defendant. But one has only to sit here in criminal court and one would find a lot of peculiar things happening. It does seem strange that a man would return to attempt a robbery a second time, but these things do happen. I therefore find the defendant guilty as charged in the indictment.

Defendant now challenges the trial court's findings and argues generally that the testimony given by Anderson was so incredible and unsatisfactory as to raise a reasonable doubt of defendant's guilt. In particular, defendant advances the following arguments in support of his theory: 1) Anderson's identification

of defendant as the robber does not square with the description Anderson gave the police shortly after the robbery, i.e., Anderson described the robber as being six feet two inches tall and weighing about 180 pounds whereas defendant is only five feet eleven inches tall and weighs about 155 pounds; 2) Anderson stated that he recognized the robber as a prior customer of the store but did not know his name at the time of the robbery. Such lack of knowledge would appear incredible if the robber had in fact been in the store as a customer on numerous prior occasions; 3) No one would be "that stupid or that naive" to rob a store in which he had previously conducted business on ten prior occasions; 4) No skillful robber would rob a store on January 15th and return three months later as a customer as Anderson testified the robber did in this case; and 5) Lottie Washington told Anderson that she was so scared she didn't know who the robber was. If she was unable to identify the robber, how could Anderson be so positive regarding his identity?

We note that these same arguments were presented to the trial judge prior to his ruling and we find them no more persuasive than did he. The law is well established in Illinois that an identification by a single witness, if it is positive and he is credible, is sufficient to prove guilt beyond a reasonable doubt. *People v. Holt* (1970) 124 Ill.App.2d 198. In our opinion, neither the testimony concerning the identification nor the testimony concerning defendant's conduct after the robbery was so unsatisfactory or improbable as to present a reasonable doubt of defendant's guilt. Hence, the judgment of the trial court must be affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J. and GOLDBERG, J., concur.

No. 55131

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
Plaintiff-Appellee,	)	COOK COUNTY.
)	
vs.)	
)	
LARRY COOK,	)	HONORABLE
	)	FRANK J. WILSON,
Defendant-Appellant.	)	PRESIDING.

MR. JUSTICE MCGLOON delivered the opinion of the court:

This is an appeal from a jury verdict finding defendant guilty of burglary for which he was sentenced by the Circuit Court to a term of from four to twelve years in the penitentiary.

On appeal the defendant contends that he was not proved guilty beyond a reasonable doubt since all of the State's evidence was circumstantial.

We affirm.

On February 4, 1970, the residence of Mr. and Mrs. Willie Dew was burglarized. Mr. Dew left for work at 3:00 p.m. on that date, and at that time all of the doors to the apartment were securely locked. Mrs. Dew, who had left for work at 7:45 a.m. that morning, returned home at 4:45 p.m. Upon doing so she noticed wooden chips on the floors in front of her door and was informed by one of her children that the apartment had been broken into. She further noticed that the lock on the front door had been broken off, and she immediately called the police. A check of the apartment disclosed that a typewriter, tape recorder and radio-record player were missing and that various drawers had been ransacked.

The evidence disclosed that a short time later two young friends of the Dew children came into the apartment and reported to Mrs. Dew that they had seen some of the Dew children's things in a nearby store. Mrs. Dew went immediately to the store and was shown the missing tape recorder and radio-record player.

James Bradley, Jr., the owner of the store, testified that the defendant came into his store at approximately 4:00 p.m. on February 4, 1970. He had a tape recorder, record player and

typewriter in his possession and asked if he could leave the tape recorder and record player in the store. Mr. Bradley, who was told by defendant that defendant was a salesman, acquiesced. He also testified that although there were two employees present in the store when he had the above conversation with defendant, neither heard the conversation.

Cook returned to the store at 7:30 p.m. that evening to pick up the items he had left with Mr. Bradley. Mr. Bradley called the police who arrested defendant in another store a short distance away from Mr. Bradley's store.

According to the testimony of Detective Gluckman, Mr. Bradley and Mrs. Dew, when Mrs. Dew went to the police station to sign a complaint against defendant, the defendant told her that if she refrained from signing the complaint, he would get her back her typewriter.

On appeal defendant argues that the two employees of the Bradley store should have been called to testify, and that failure to call them gives rise to an inference that the employees could not have identified defendant as the person who brought the articles into the store. We find no such inference from the failure of Bradley's employees to testify. Bradley's identification of the defendant as the person who brought the merchandise to his store was positive and unequivocal. The only testimony concerning the two employees was raised by the defense on cross-examination, and it only concerned whether or not they overheard the defendant's conversation with Bradley. When Bradley testified that they could not, the issue was dropped, and no issue of identification by the employees was raised at trial.

Finally, although defendant was convicted of burglary by circumstantial evidence, his conviction must stand. As this court stated in People v. Mitchell, 268 N.E. 2d 232 (Ill. App., 1971) at page 3 of the abstracted decision:

Entry into the burglarized premises, an essential element of the crime of burglary, may be

proved by circumstantial as well as direct evidence. Circumstantial evidence is legal evidence and there is no distinction between circumstantial and direct evidence so far as weight and effect are concerned. A conviction for burglary can be sustained upon circumstantial evidence. The recent, exclusive and unexplained possession of stolen property, soon after the commission of a burglary, is evidence of the guilt of the person in whose possession it is found and is sufficient to warrant a conviction. People v. Francis, 362 Ill. 247, 199 N.E. 2d 100 (1935); People v. Brown, 27 Ill. 2d 23, 187 N.E. 2d 728 (1963), cert den. 374 U.S. 854.

In summary, the circumstantial evidence used to convict defendant was as follows: The burglary took place after 3:00 p.m. on February 4, 1970. At 4:00 p.m. defendant entered Bradley's nearby store with burglarized goods which he left with Bradley. He returned and redeemed the goods and was arrested a short while thereafter. Three people testified that defendant offered to get Mrs. Dew her typewriter if she would not sign a complaint against him.

This evidence was believed by the jury who were the triers of fact, and it so thoroughly established defendant's guilt as to exclude every reasonable hypothesis of his innocence. People v. Dougard, 16 Ill. 2d 603, 158 N.E. 2d 596 (1959).

Judgment affirmed.

McNAMARA, P.J., and DEMPSEY, J., concur.



1 2
APST.

I.A.³ 400
MAR 20 1972

No. 54934

CATHERINE E. WILLIAMS,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
Plaintiff-Appellee,	)	COOK COUNTY.
)	
vs.)	
)	
HARRY WISOWATY,	)	HONORABLE
	)	ARTHUR L. DUNNE,
Defendant-Appellant.	)	PRESIDING.

MR. JUSTICE MCGLOON delivered the opinion of the court:

This is an appeal from an order of the Circuit Court confirming a judgment entered by confession in favor of plaintiff on an alleged promissory note executed by defendant. Defendant here contends that what appeared to be a promissory note was, in fact, a receipt evidencing a partnership between plaintiff and defendant in the operation of a building. The defendant prays that this court reverse the judgment of \$1821.30 entered against him in the Circuit Court.

We reverse.

Plaintiff was secretary to the president of Trident Savings & Loan Association. Defendant was an insurance salesman doing business with the association. Plaintiff gave defendant \$1200, and he in return gave to plaintiff a signed promissory note filled out in his own handwriting. On the back of this note the following typed language appears: "Received the sum of Twelve Hundred and no/100 (\$1200.00) toward the purchase of one half (1/2) interest in Real Estate commonly known as 4611 Hermitage Avenue, Chicago, Ill." Defendant's signature appears immediately below this language.

When sued on the note, defendant affirmatively asserted that this language evidenced that what appeared to be a note was, in fact, a receipt of plaintiff's contribution to a partnership, the object of which was to purchase and operate the building located at 4611 Hermitage Avenue at a profit.

The following evidence was adduced at the hearing.

Harry Wisowaty, defendant, testified as follows: He purchased

the property at 4611 North Hermitage after it was foreclosed by Trident. He said he drew the face of the note in longhand and signed it, and also signed the reverse side of the note after plaintiff typed the quoted language on it. Defendant further testified that this note and the reverse side language were intended by the parties to evidence a partnership agreement with Mrs. Williams as the silent partner due to her employment as secretary to the president of Trident. The partnership agreement was that plaintiff would receive 7 per cent interest on the note if the building operated at a profit, and would receive her investment plus one-half the profit when the building was sold. Defendant invested \$1500 of his own money toward the partnership, but due to the many building code violations present in the building, no profit could be realized. Defendant offered the building (title to which was in his name) to plaintiff. She refused stating, "If I (defendant) wasn't able to manage it she (plaintiff) certainly couldn't." Defendant deeded it back to Trident.

Mrs. Williams, plaintiff, testified that defendant gave her the note with the questionable language already on the reverse side. She further testified that no principal payments had been made on the note, that defendant offered her the property, but that she declined.

Notations made and placed on the back of a note contemporaneously with the execution of the instrument, with the intention of making them a part of the contract for payment of money, constitute as much a part of the instrument as though incorporated on the face of the note. In re Feldman's Estate, 387 Ill. 568, 56 N.E. 2d 405 (1944).

The language appearing on the reverse side of the note, in and of itself, raises doubt as to the status of the instrument to which it was affixed. The language is more than a mere recitation of the consideration for the note. The record discloses that defendant testified that this language evidenced a partnership entered into between the plaintiff and him. This issue was completely

ignored by the plaintiff both when cross-examining defendant, and when testifying on direct. This testimony, in conjunction with the language on the reverse side of the note, presents uncontradicted evidence that a partnership existed between plaintiff and defendant. The judgment was clearly against the manifest weight of the evidence and should be reversed.

Judgment reversed.

McNAMARA, P.J., and DEMPSEY, J., concur.

ABST.

2 I.A.³ 401

55129

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM
Plaintiff-Appellee,)	
	)	CIRCUIT COURT,
vs.)	
	)	COOK COUNTY.
BOISY L. BANKS (Impleaded),)	
Defendant-Appellant.)	)	HON. JOHN C. FITZGERALD,
		Presiding.

MR. PRESIDING JUSTICE BURKE delivered the opinion of the court:

Defendant was found guilty at a bench trial of the crime of theft of property having a value in excess of \$150 and sentenced to a term of one year to three years in the penitentiary. He appeals.

Chicago Police Officer Clarence Young testified for the People that at about 3:00 P.M. on July 18, 1966, while cruising with two other uniformed police officers in a marked squad car, he observed the defendant seated in the driver's seat of an automobile parked in the 1100 block of South Central Park Avenue in Chicago. Seated to the right of the defendant in the front seat of the vehicle was Bertha Williams, and seated to her right was Cleophas Goggins. The rear seat of the vehicle was occupied by two men, Jerome Reese and John Brown, and also by a pile of boxes stacked to a height above the lower window line. The officer testified that he had known the defendant (Banks), Williams and Goggins for a period of about two years and that he had known that the automobile (hereinafter referred to as "defendant's vehicle") was in fact owned by one Sam Gilmore.

Officer Young testified that the police vehicle in which he was riding executed a U-turn at the corner of the block and returned to the defendant's vehicle, which was then in the process

of being backed into an alley. The officer stopped the defendant's vehicle and questioned the defendant as to how he came into possession of the vehicle, to which defendant replied that he received permission to use the vehicle from Gilmore's "old lady." The officer inquired as to the contents of the boxes piled on the rear seat and defendant informed him that they contained women's lingerie. The officer then asked the defendant to whom did the boxes of clothing belong and the defendant replied that they belonged to a woman who lived on Madison Street, the name of whom the officer was unable to recall.

The officer then told the five occupants of the vehicle to step to the street, he looked into the boxes piled on the rear seat, and he thereupon placed the defendant and the others under arrest and handcuffed them. The officer discovered additional boxes of lingerie in the trunk of the defendant's vehicle.

Mr. Joseph Friedman testified for the People that he was a supervisor for Phil-maid, Inc., a company that manufactured women's wearing apparel, located at 1033 West Van Buren Street in Chicago. The witness testified that he had been the supervisor of that company's shipping and order department for about twenty years. The witness described in detail the procedure employed by his department for the filling and packing of orders. He stated that some orders are filled and packed, but are held aside in a designated area of the company premises because they are not then ready for shipment to the customer for various reasons; such orders are known as "pack and hold shipments."

Friedman testified that about 3:00 P.M. on July 18, 1966 he was summoned to the police station where he identified the boxes of merchandise belonging to Phil-maid which had been seized from the defendant's automobile. A carton containing several of the

boxes bore the Phil-maid label; the carton was also marked with the name of a Florida customer to whom the carton was to be shipped.

Mr. Friedman testified that an inventory was made later that day of the "pack and hold shipment" orders stacked in the designated area of the company premises which revealed two of four cartons set aside for the Florida customer to have been missing. He further testified that by checking the value of the merchandise in the two cartons remaining on the company premises against the Florida customer's order manifest, his employees, at his direction, were able to determine the value of the goods taken to have been \$546.95, and that the value of the goods returned by the police to have been \$440.20. Those figures were reflected on slips of paper which were introduced into evidence at trial over objection of the defendant.

Mr. Friedman testified that some time prior to 3:00 P.M. on July 18, 1966 two boys entered the Phil-maid premises seeking employment, but Friedman escorted them from the premises because there were no job openings with the company. Friedman testified that neither the defendant nor his companions resembled the boys he escorted from the premises. The witness also testified that shortly after he escorted them from the premises, construction workers making repairs on the company buildings informed him that they had seen two men carrying cartons out of the building.

Defendant testified in his own behalf and stated that he received the merchandise found in the automobile operated by him on the date in question from a person named Mary Williams, who asked him to deliver the items to an address on South Springfield Avenue in Chicago. He further testified that after he had received the merchandise from Williams, he drove in a westerly direction and along the way he picked up the persons who were in the vehicle

when it was stopped by Officer Young.

Defendant initially contends that the trial court erred in admitting into evidence the answers given to Officer Young's questions relating to the ownership of and the contents of the boxes piled on the rear seat of the defendant's automobile, inasmuch as the officer did not theretofore advise the defendant of his constitutional rights pursuant to *Miranda v. Arizona*, 384 U.S. 436. We disagree.

The record discloses that the answers given by defendant were the product of routine preliminary police investigation in the matter and were not given by the defendant while in police custody. Officer Young testified that he observed the defendant operating a vehicle owned by another person which contained several passengers and numerous boxes piled in open view on the rear seat. There is evidence in the record that Officer Young had been assigned, with his two fellow police officers, to an area of the city which had experienced "quite a bit of trouble." It further appears from the record that windows of buildings in the area were broken, and that an "unusual number" of police officers were present in the area.

Officer Young stopped the defendant's vehicle and inquired as to how the defendant came into possession of the vehicle, who owned the packages on the rear seat, and what their contents were. After the defendant had answered those questions, the officer told the defendant and his companions to alight from the vehicle, the officer inspected the contents of the boxes, and he then placed the defendant and his companions under arrest and handcuffed them. The defendant was not in custody at the time he answered the officer's routine preliminary questions and consequently the requirements set out in the *Miranda* case are not applicable to the instant situation. Rather, the questioning

here falls within that "[g]eneral on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process" which the Miranda court stated was not affected by its holding therein. *Miranda v. Arizona*, 384 U.S. 436, 477. See also *People v. Tate*, 45 Ill.2d 540, 543-544.

Although defendant contends that Officer Young testified that he had the conversation with the defendant after the officer determined the contents of the boxes, it appears from the record that the questioning of the officer at that point became confusing, that the officer requested that the question be rephrased, and that the officer testified that he placed the defendant under arrest after having had the conversation concerning the possession of the automobile and the ownership of and the contents of the boxes. The officer, during his direct examination, was specifically asked, "You asked [the questions] and they gave answers before you looked at the contents of the boxes?" to which the officer answered, "Right."

The cases cited by defendant in support of his contention are inapposite on their facts from the case at bar. They involve situations where statements were given during the "custodial interrogations" envisioned by the Miranda court. See *People v. Lefler*, 38 Ill.2d 216; *People v. Costa*, 38 Ill.2d 178.

As an aside within his contention relating to the alleged failure to give the Miranda warnings, defendant argues that the trial court erred in failing to hold, sua sponte, a hearing as to the voluntariness of the answers given by defendant to the officer's questioning. As noted above, the answers were given in response to routine preliminary questioning by the officer. Further, the cases cited by the defendant in support of this

contention involve confessions given by the respective defendants therein, which is not the situation here. See *People v. Thigpen*, 33 Ill.2d 595; *People v. Garner*, 109 Ill.App.2d 81; *People v. Strader*, 38 Ill.2d 93.

Defendant next contends that the People failed to prove beyond a reasonable doubt that he had exclusive possession of the stolen property. The evidence reveals that defendant was operating and in control of a vehicle wherein recently stolen merchandise was found. The People's evidence further reveals that defendant had knowledge of the contents of the boxes on the seat of the vehicle, as well as in its trunk, as does defendant's own testimony. There was sufficient evidence from which the trier of fact could have found defendant to have been in the possession of the stolen merchandise. The cases cited by defendant in support of his contention involve the respective defendants' mere association with a stolen item, rather than actual possession of the stolen item, as here. See *People v. Barnes*, 311 Ill. 559; *People v. Robinson*, 23 Ill.2d 27; *People v. Evans*, 24 Ill.2d 11.

Defendant further contends that the People failed to prove him guilty of theft beyond a reasonable doubt. We disagree.

Recent, exclusive and unexplained possession of stolen property is sufficient to support a conviction for theft, absent facts and circumstances raising a reasonable doubt as to guilt. *People v. Hawkins*, 27 Ill.2d 339. Defendant was found driving a vehicle containing several boxes of merchandise stolen only a few hours before. Defendant's attempted explanation of his possession of the merchandise was undoubtedly found incredible by the trier of fact. The "Mary Williams" from whom defendant

allegedly received the merchandise did not testify at trial, and, as it appears from the record, could not be located by defendant for such purpose. The explanation offered by the defendant was judged by its improbabilities, and, compounding the incredibility of defendant's explanation, was his disappearance from the courtroom after a recess had been called during his testimony, resulting in a forfeiture of his bond. People v. Smith, 107 Ill.App.2d 267.

Defendant further argues in this regard that the testimony given by Mr. Friedman, that neither defendant nor his companions resembled the two boys the witness escorted from the Phil-maid premises, shows that the defendant could not be involved in the theft. Defendant, however, overlooks Mr. Friedman's further testimony that the construction workers present on the company premises shortly thereafter observed two men, not boys, carry cartons from the premises.

The final contention raised by the defendant is that the People failed to prove that the value of the merchandise taken from the Phil-maid premises was in excess of \$150. We disagree.

Mr. Friedman, supervisor of the packing and shipping department of the Phil-maid company for twenty years, placed the value of the merchandise taken at \$546.95, and the value of the merchandise returned by the police after the theft at \$440.20. The witness was qualified to testify to the value of the merchandise taken. The lists containing the values of the merchandise taken and returned were merely corroborative of the testimony of Mr. Friedman.

For these reasons the judgment is affirmed.

JUDGMENT AFFIRMED.

LYONS and GOLDBERG, JJ., concur.

State of Illinois)
Appellate Court) ss:
Second District)

ABST.

At a session of the Appellate Court, begun and held at Elgin, on the 6th day of December, in the year of our Lord one thousand nine hundred and seventy-one, within and for the Second District of Illinois:

Present -- Honorable GLENN K. SEIDENFELD, Presiding Justice
Honorable MEL ABRAHAMSON, Justice
Honorable WILLIAM L. GUILD, Justice
HOWARD K. KELLETT, Clerk
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On December 21, 1971 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

FILED
11/01/71
HOWARD K. KELLETT, Clerk
Appellate Court, 2d District

PEOPLE OF THE STATE OF ILLINOIS,)
)
Plaintiff-Appellee,)
)
v.) Appeal from the
) Circuit Court of
JOSE COMANCIO,) Lake County, Illinois.
)
Defendant-Appellant.)

MR. JUSTICE ABRAHAMSON delivered the opinion of the Court.

Defendant, Jose Comancho, 20 years of age, waived indictment and entered a plea of guilty to an information dated July 2, 1970, which charged him with the offense of conspiracy with the intent to unlawfully sell marijuana in violation of the Narcotic Drug Act, on December 12, 1969. He has appealed from the judgment of conviction and a sentence of one to three years in the penitentiary.

The conspiracy, to be a crime, must be a conspiracy "with intent that an offense be committed." Ill. Rev. Stat. 1969, ch. 38, par. 8-2. The sale of marijuana did not charge an offense under the Narcotic Drug Act then in force. This case is controlled by the opinion of *The People v. McCabe*, Supreme Court Docket # 42674, filed Oct., 1971; rehearing denied November 24, 1971, 49 Ill. 2d 338 (1971) and *The People v. Hudson*, Supreme Court Docket # 43994, filed Nov. 30, 1971, Ill. 2d (1971).

Therefore, the judgment of the Trial Court is reversed.
JUDGMENT REVERSED.
SEIDENFELD and HLD, JJ., Concur.

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

ARST.

2 I.A. 476

At a session of the Appellate Court, begun and held at Elgin, on the 6th day of December, in the year of our Lord one thousand nine hundred and seventy-one, within and for the Second District of Illinois:

Present -- Honorable WILLIAM L. GUILD, Acting Presiding Justice
Honorable THOMAS J. MORAN, Justice
Honorable MEL ABRAHAMSON, Justice
HOWARD K. KELLETT, Clerk
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On December 21, 1971 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

DEC 21 1971

HOWARD K. KELLETT, Clerk
Appellate Court, 2d District

PEOPLE OF THE STATE OF ILLINOIS)	
)	
Plaintiff-Appellee	)	Appeal from the Circuit
	)	Court of the 19th Judicial
-vs-	)	Circuit, Lake County
)	
	)	Hon. Lloyd A. Van Deusen
	)	Judge presiding
JIMMY TRICE)	
)	
Defendant-Appellant)	

MR. JUSTICE GUILD delivered the opinion of the court;

The defendant herein was tried by a jury for sale of "certain narcotic drug in excess of 2.5 grams. . .to-wit: cannabis sativa L. more commonly known as marijuana" in violation of the Narcotic Drug Act, Chap. 38, Sec. 22-3, Ill. Rev. Stat. (1969). The jury returned a verdict of guilty and on December 18, 1970 the defendant was sentenced 10-11 years in the Illinois State Penitentiary at Joliet.

It is not necessary for us to consider any of the alleged grounds for reversal other than the one pertaining to classification of marijuana as a narcotic under the uniform drug act. Subsequent to the filing of this appeal the Supreme Court of Illinois issued its opinion in The People v. Mc Cabe, Supreme Court Docket #42674, filed October 1971; rehearing denied November 24, 1971; 49 Ill.2d 338 (1971) which pertains to the unlawful sale of marijuana in violation of the same statutory provision as in the instant case. The Supreme court held that the classification of marijuana as a narcotic drug was "arbitrary and deprives the defendant of equal protection of the law." The judgment of conviction was reversed and not remanded. See The People v. Hudson, Supreme Court Docket #43994, filed .

It is therefore the order of this court that the judgment of conviction herein be reversed and the defendant is ordered discharged from the Illinois State penitentiary at Joliet forthwith.

Reversed.

Moran - Abrahamson, JJ concurs

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

ABST.

At a session of the Appellate Court, begun and held at Elgin, on the 7th day of December, in the year of our Lord one thousand nine hundred and seventy, within and for the Second District of Illinois:

Present -- Honorable THOMAS J. MORAN, Presiding Justice
Honorable GLENN K. SEIDENFELD, Justice
Honorable WILLIAM L. GUILD, Justice
HOWARD K. KELLETT, Clerk
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to-wit: On November 15, 1971 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

FILED

NOV 15 1971

HOWARD K. KELLETT, Clerk
Appellate Court, 2d District

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,)	
)	
vs.	)	Appeal from the
	)	Circuit Court of
	)	the Eighteenth
WILLIAM SCHOENECK,	)	Judicial Circuit,
	)	DuPage County,
Defendant-Appellant.	)	Illinois.

PRESIDING JUSTICE THOMAS J. MORAN DELIVERED THE OPINION OF THE COURT:

A three count indictment was returned against the defendant. The first and second count charged the defendant with separate burglaries and the third count, with theft less than \$150. The public defender was appointed and a plea of not guilty entered.

On the morning set for trial, the court was informed that plea negotiations had taken place. Defense counsel, desirous of having the defendant personally make the final decision on the agreement reached, requested a continuance. The court, instead of ruling on the motion, informed the defendant that they would proceed in selecting a jury that afternoon.

After counsel conferred, an in-chambers meeting with the court was requested. There, it was related that defense counsel and defendant had again discussed the plea negotiations and that defendant was ready to proceed in open court under the terms of the plea agreement. This was done and the defendant was sentenced in accordance with the plea agreement. This appeal followed.

While the appeal was pending, defendant's counsel filed a motion to withdraw supported by a brief, claiming the appeal to be frivolous. The only illusory issues raised were whether: the defendant was fully advised of his rights, the plea was voluntarily and intelligently entered, or the trial court's refusal to grant a continuance was an abuse of discretion or prejudicial to the defendant. A copy of the motion was served upon the defendant.

This Court, in its customary practice, mailed a copy of the motion to the defendant and granted him leave to file additional points in support of the appeal. Defendant did not respond.

In accordance with the dictates of Anders v. California, 386 U.S. 738, we have carefully reviewed the entire record and conclude that the defendant was fully advised of his rights, that he voluntarily and intelligently entered his plea of guilty, that the trial court's refusal to continue the cause was neither an abuse of discretion or prejudicial to the defendant, that no other error exists in the record and that the appeal is frivolous and without merit.

Counsel for defendant is allowed to withdraw and the judgment herein is affirmed.

JUDGMENT AFFIRMED.

Guild and Seidenfeld, J. J. - Concur

General No. 11437

Agenda No. 71-53

ABSTRACT

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

People of the State of Illinois,)	
)	
Plaintiff-Appellee	)	Appeal from
	)	Circuit Court
vs.	)	Macon County
)	
John Ellis Hopkins,)	
)	
Defendant-Appellant)	

MR. PRESIDING JUSTICE SMITH delivered the opinion of the court:

The Illinois Defender Project moved to withdraw as counsel for the defendant and accompanied the motion with a brief in conformity with *Anders v. State of California*, 386 US 738, 18 L ed 2d 493, 87 S Ct 1396. The record shows proof of service of the motion and the brief filed upon the defendant. The motion was continued for sixty days for the defendant to file any other further or additional suggestions. None were filed.

The record shows that the defendant was charged with burglary. He withdrew his plea of not guilty and pleaded guilty to the indictment. Sentence of one to ten years was imposed in this case to run concurrently with another burglary sentence in which an opinion is filed concurrently herewith. General No. 11438, *People v. Hopkins*.

In their motion to withdraw, the Defender Project states that they have read and carefully considered the sufficiency of the indictment, the record on the plea of guilty, including the trial judge's admonition concerning the nature of the charges, the length of the possible sentence and the determination by the court that the defendant knowingly and understandingly waived all rights. Defendant answered that he knew the nature of the offense, understood the length of the sentence, understood the consequence of the plea, understood the waiver of his right to trial, and stated that there was no coercion, promises or an attempt on his part to shield another and stated that he was pleading guilty because he "in fact committed this offense". The record also shows that the sentence was unambiguous and the sentence of one to ten years for two separate offenses committed within about three months of each other cannot be considered excessive. It was the conclusion of the Defender Project that no error was committed in the trial court and that the appeal is frivolous.

In the discharge of our duties, we, too, have examined this record and agree that an appeal in this case is wholly frivolous and without merit. Accordingly, the petition of the Illinois Defender Project to withdraw as counsel for the defendant-appellant is allowed and the judgment of the trial court is affirmed.

Affirmed.

Trapp, J. and Craven, J. concur.

State of Illinois)
Appellate Court) ss:
Second District)

ABST.

At a session of the Appellate Court, begun and held at
Elgin, on the 6th day of December, in the year of our Lord
one thousand nine hundred and seventy-one, within and for the
Second District of Illinois:

Present -- Honorable GLENN K. SEIDENFELD, Presiding Justice
Honorable MEL ABRAHAMSON, Justice
Honorable WILLIAM L. GUILD, Justice
HOWARD K. KELLETT, Clerk
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On
December 21, 1971 the Opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, viz:

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

FILED
1971 OCT 13 10 11 AM
CLERK OF COURT

1971 OCT 13

HOWARD K. KELLEY, Clerk
Appellate Court, 2d District

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,)	
)	
v.	)	Appeal from the Circuit
	)	Court of the 18th Judicial
ALBERT A. DYON, JR.,	)	Circuit, DuPage County,
	)	Illinois.
Defendant-Appellant.)	

MR. JUSTICE ABRAHAMSON delivered the opinion of the Court.

Defendant, Albert A. Dyon, Jr., was indicted on September 16, 1969, for the unlawful sale of marijuana on August 13, 1969. He appeals from the judgment of conviction and the sentence of 10 to 14 years in the penitentiary.

In October of 1971, the Supreme Court in *The People v. McCabe*, Supreme Court Docket # 42674, filed Oct., 1971; rehearing denied November 24, 1971, 49 Ill. 2d 338 (1971) held invalid that portion of the Narcotic Drug Act relating to marijuana. Also, see *The People v. Hudson*, Supreme Court Docket # 43994, filed Nov. 30, 1971, Ill. 2d (1971).

Therefore, the judgment of the Trial Court is reversed.

JUDGMENT REVERSED.

SEIDENFELD and GUILD, JJ., concur.

70-123

2 I.A.³ 581

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

ABST.

At a session of the Appellate Court, begun and held at Elgin, on the 6th day of December, the year of our Lord one thousand nine hundred and seventy-one, within and for the Second District of Illinois:

Present -- Honorable GLENN K. SEIDENFELD, Presiding Justice
Honorable THOMAS J. MORAN, Justice
Honorable MEL ABRAHAMSON, Justice
HOWARD K. KELLETT, Clerk
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On

December 22, 1971 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

FILED

No. 70-123

DEC 22 1971

HOWARD K. KELCOTT, Clerk
Appellate Court, 2d District

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

Abstract

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,)	
vs.	)	Appeal from the Circuit
	)	Court of the 18th Judi-
MICHAEL NELMS,	)	cial Circuit, DuPage
	)	County, Illinois.
Defendant-Appellant.)	

MR. JUSTICE SEIDENFELD delivered the opinion of the court:

The defendant, Michael Nelms, was indicted on September 16, 1969 for the offense of unlawful sale of marijuana (Ill.Rev. Stat.1969, ch. 38,par.22-3) alleged to have occurred on or about August 13, 1969. He appeals from the judgment of conviction after a jury verdict, and from the sentence of 10-12 years in the penitentiary.

This appeal is controlled by the opinion of the Illinois Supreme Court in The People v. McCabe, Supreme Court Docket #42674, filed October, 1971; rehearing denied November 24, 1971; 49 Ill.2d 338 (1971). See also, The People v. Hudson, Supreme Court Docket #43994, decided November 30, 1971; ____ Ill.2d

The judgment below is therefore reversed.

REVERSED.

MORAN, P.J. and ABRAHAMSON, J.-Concur.

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

ABST.

At a session of the Appellate Court, begun and held at Elgin, on the 6th day of December, the year of our Lord one thousand nine hundred and seventy-one, within and for the Second District of Illinois:

Present -- (Honorable GLENN K. SEIDENFELD, Presiding Justice
Honorable THOMAS J. MORAN, Justice
Honorable MEL ABRAHAMSON, Justice
HOWARD K. KELLETT, Clerk.
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On

December 22, 1971 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

FILED

No. 70-248

DEC 22 1971

HOWARD K. KELLETT, Clerk
Appellate Court, 2d District

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

Abstract

PEOPLE OF THE STATE OF ILLINOIS,)
)
Plaintiff-Appellee,)
vs.)Appeal from the Circuit
JERRY YOUNG,)Court for the 19th Judi-
)cial Circuit, Lake
)County, Illinois.
Defendant-Appellant.)

MR. JUSTICE SEIDENFELD delivered the opinion of the court:

Defendant, Jerry Young, was indicted on March 2, 1970 for the offense of attempt sale of marijuana alleged to have occurred on December 4, 1969. He has appealed from the judgment of conviction and the sentence of 3-5 years in the penitentiary.

The act attempted must be a crime, i.e. there must be an "intent to commit a specific offense" for there to be an attempt. Ill.Rev.Stat.1969, ch.38, par.8-4; 21 Am.Jur.2d par. 112. The sale of marijuana did not charge an offense under the statutes then in force. This case is controlled by the opinion of The People v. McCabe, Supreme Court Docket \$42674, filed October 1971; rehearing denied November 24, 1971; 49 Ill.2d 338 (1971). See also, The People v. Hudson, Supreme Court Docket #43994, decided November 30, 1971; ___ Ill.2d ___

The judgment below is therefore reversed.

REVERSED.

MORAN, P.J. and ABRAHAMSON, J.-Concur.

70-164
UNITED STATES OF AMERICA

2 I.A.³ 582

State of Illinois)
Appellate Court) ss:
Second District)

ABST.

At a session of the Appellate Court, begun and held at Elgin, on the 6th day of December, in the year of our Lord one thousand nine hundred and seventy-one, within and for the Second District of Illinois:

Present -- Honorable WILLIAM L. GUILD, Acting Presiding Justice
Honorable MEL ABRAHAMSON, Justice
Honorable THOMAS J. MORAN, Justice
HOWARD K. KELLETT, Clerk
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On December 23, 1971 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

70-164

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

DEC 23 1971

HOWARD K. KELLETT, Clerk
Appellate Court, 2d District

PEOPLE OF THE STATE OF ILLINOIS)	
)	
Appellee	)	Appeal from the 16th
	)	Judicial Circuit, Kane
-vs-	)	County
)	
PHILLIP SIRBEN	)	Hon. John S. Petersen
	)	Judge presiding
Defendant)	

MR. JUSTICE GUILD delivered the opinion of the court:

Phillip Sirben, 17 years of age, on March 17, 1970, was convicted in the Circuit court of Kane County of unlawful sale and possession of narcotic drugs in violation of Chap. 38, Sec. 22-3, Illinois Rev. Stat., and after a jury trial was sentenced to a term of 10-12 years in the Illinois State penitentiary. The charge was based upon an alleged sale of a \$5 bag of marijuana containing "less than one ounce" to a 15 year old acquaintance, John Kramer, who participated in the transaction in cooperation with members of the Aurora police department.

This case is controlled by the opinion of The People v. Mc Cabe, Supreme Court Docket #42674, filed October 1971; rehearing denied November 24, 1971; 49 Ill.2d 338(1971) which pertains to the unlawful sale of marijuana in violation of the same statutory provision as in the instant case. The Supreme court held that the classification of marijuana as a narcotic drug was "arbitrary and deprives the defendant of equal protection of the law." The judgment of conviction was reversed and not remanded.

In the instant case the defendant herein has served at least eighteen months in the Illinois State penitentiary at Joliet for this offense.

It is therefore the order of this court that the judgment of conviction herein be reversed and the defendant is ordered discharged from the Illinois State penitentiary at Joliet forthwith.

Reversed.

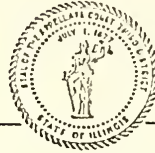
P.J. MORAN and J. ABRAHAMSON Concur.

2 I.A.³ 649

NO. 71-121

STATE OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS
VS.
FLOYD CUTLIFF



ABST.

APPELLATE COURT THIRD DISTRICT
OTTAWA

At a term of the Appellate Court, begun and held at
Ottawa, on the 1st Day of January in the Year of our Lord
one thousand nine hundred and seventy-one, within and for the
Third District of Illinois:

Present—

HONORABLE JAY J. ALLOY, Presiding Justice

HONORABLE ALLAN L. STOUDEER, Justice

HONORABLE ALBERT SCOTT, Justice

HONORABLE WALTER DIXON, Justice

JOHN E. HALL, Clerk

JAMES A. CALLAHAN, SHERIFF

BE IT REMEMBERED, that afterwards on
December 22, 1971 the Opinion of the
Court was filed in the Clerk's Office of said Court, in the
words and figures following, viz:—

In The
APPELLATE COURT OF ILLINOIS
Third District
A. D. 1971.

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Henry County.
)	_____
vs.)	
	)	Honorable
FLOYD CUTLIFF,	)	J. P. Wilamoski
	)	Presiding Judge.
Defendant-Appellant.)	

Abstract

PER CURIAM

Defendant Floyd Cutliff was indicted for the offenses of Burglary and Attempted Robbery. As a result thereof he was sentenced pursuant to a plea of guilty to two terms of two (2) to ten (10) years in the Illinois Penitentiary to be served concurrently.

Defendant was properly arraigned and was represented by counsel and given copies of the indictments. The indictments were read to him as required by statute. The court explained to defendant that he had a right to a jury or bench trial and the right of confrontation and cross-examination of witnesses and the right further to require that the prosecution prove his guilt beyond a reasonable doubt. Other charges involving defendant were dismissed. Defendant waived trial by jury and admitted that he was guilty of the charges and voluntarily entered his pleas of guilty. The court advised defendant of the minimum and maximum penalties for the offenses and defendant persisted in his pleas.

The court was advised by the State's Attorney and attorney for defendant that pleas had been negotiated pursuant to Supreme Court Rule 402. The court advised defendant that he was not bound by these agreements and could withdraw his pleas if the court did not concur with the arrangement recommended by the attorneys. Defendant persisted in the pleas of guilty and declined to withdraw such pleas. Defendant also indicated that he had consulted with his attorney and was satisfied with his services. The court sentenced defendant to a term of from two (2) to ten (10) years on each charge (to be served concurrently) in conformity with the pleas of guilty, and, pursuant to the agreement as to the negotiated pleas. The court determined that the pleas were voluntary. The court fully advised defendant of the possible punishment for the crimes involved.

We have made a full examination of all proceedings in this case in accordance with ANDERS v. CALIFORNIA, 386 U.S. 738, and we agree with the position asserted by the attorney appointed to handle defendant's appeal in this cause, that the court fully complied with all the requirements of BOYKIN v. ALABAMA, 395 U.S. 238, and Rule 402 of the Illinois Supreme Court. As properly pointed out by counsel, since hearings in aggravation and mitigation were in fact waived, there is no realistic basis for urging a reduction of sentence. Defendant was adequately represented by counsel.

From an examination of the record, therefore, we must conclude that the Circuit Court of Henry County properly denied defendant's petitions for post-conviction relief in the causes referred to in this opinion. It is apparent that there is no basis for an appeal and as defense counsel has pointed out such appeal would be wholly frivolous.

We have heretofore granted leave to the attorney appointed in this court, Bruce Stratton, District Defender, Illinois Defender Project, to withdraw. On the basis of our complete examination of the record, we have concluded that the judgment in this cause should be and is, accordingly, affirmed.

Judgment Affirmed.

STATE OF ILLINOIS

APPELLATE COURT

ABST.

AT AN APPELLATE COURT, for the Fourth Judicial District of the
State of Illinois, sitting at Springfield:

PRESENT

HONORABLE SAMUEL O. SMITH, Presiding Judge

HONORABLE HAROLD F. TRAPP, Judge

HONORABLE JAMES C. CRAVEN, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 23rd day
of November A. D. 19 71, there was filed in the office of
the Clerk of the Court an opinion of said Court, in words and figures
following:

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

People of the State of Illinois)	
)	
Plaintiff-Appellee	)	Appeal from
	)	Circuit Court
vs.	)	Macon County
)	
John Ellis Hopkins)	
)	
Defendant-Appellant)	

MR. PRESIDING JUSTICE SMITH delivered the opinion of the court:

The Illinois Defender Project moved to withdraw as defendant's counsel and accompanied the motion with a brief in conformity with *Anders v. State of California*, 386 US 738, 18 L ed 2d 493, 18 S Ct 1396. The record shows proof of service of the motion and the brief filed upon the defendant. The motion was continued for sixty days for the defendant to file any other further or additional suggestions. None were filed.

The record shows that the defendant was charged with burglary. He withdrew his plea of not guilty and pleaded guilty to the indictment. Sentence of one to ten years was imposed in this case to run concurrently with another burglary sentence in which an opinion is filed concurrently herewith. General No. 11437, *People v. Hopkins*.

In their motion to withdraw, the Defender Project states that they have read and carefully considered the sufficiency of the indictment, the record on the plea of guilty, including the trial judge's admonition concerning the nature of the charges, the length of the possible sentence and the determination by the court that the defendant knowingly and understandingly waived all rights. Defendant answered that he knew the nature of the offense, understood the length of the sentence, understood the consequence of the plea, understood the waiver of his right to trial, and stated that there was no coercion, promises or an attempt on his part to shield another and stated that he was pleading guilty because he "in fact committed this offense". The record also shows that the sentence was unambiguous and the sentence of one to ten years for two separate offenses committed within about three months of each other cannot be considered excessive. It was the conclusion of the Defender Project that no error was committed in the trial court and that the appeal is frivolous.

In the discharge of our duties, we, too, have examined this record and agree that an appeal in this case is wholly frivolous and without merit. Accordingly, the petition of the Illinois Defender Project to withdraw as counsel for the defendant-appellant is allowed and the judgment of the trial court is affirmed.

Affirmed.

Craven, J. and Trapp, J. concur.

STATE OF ILLINOIS

APPELLATE COURT

ABST.

AT AN APPELLATE COURT, for the Fourth Judicial District of the
State of Illinois, sitting at Springfield:

PRESENT

HONORABLE HAROLD F. TRAPP, Presiding Judge
HONORABLE SAMUEL O. SMITH, Judge
HONORABLE JAMES C. CRAVEN, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 22nd day
of December A. D. 19 71, there was filed in the office of
the Clerk of the Court an opinion of said Court, in words and figures
following:

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

General No. 11457

Agenda 71-112

Hubert Diggins,

Plaintiff-Appellant,

vs.

Illini Production Credit Association, a
corp., and Audrie E. Adkins,

Defendants-Appellees.

Appeal from
Circuit Court
Greene County

PER CURIAM.

The circuit court of Greene County dismissed plaintiff's second amended complaint and entered judgment for the defendants. Plaintiff appeals. By his original complaint the plaintiff sought to state a cause of action against the defendant, Illini Production Credit Association, a corporation, making allegations of fraud, collusion, overreaching, and conspiracy allegedly perpetrated by the defendant in connection with an earlier 1964 foreclosure proceeding wherein the plaintiff was the owner of the property foreclosed.

The original complaint was dismissed. An amended complaint was filed; motions directed toward that complaint were allowed and a second amended complaint consisting of two counts was filed pursuant to leave of court. In the second amended complaint the plaintiff repeated and realleged paragraphs 1 through

25 inclusive of the amended complaint and in addition, in Count I, set forth three paragraphs of additional allegations as against the defendant, Illini, and Count II was an effort to state a cause of action against the defendant, Audrie Adkins, alleging fraud and collusion in connection with her activities as purchaser at the foreclosure sale. This second amended complaint was dismissed and the final judgment now appealed was entered.

From the record before us certain of the facts with reference to the 1964 foreclosure proceedings may be discerned. In April of that year Illini secured a judgment against Hubert Dwiggin and Dorothy Dwiggin in the circuit court of Greene County in an amount in excess of \$67,000. At that time Illini held a second mortgage on certain real estate, approximately 480 acres in Greene County, and the mortgage was security for 4 promissory notes which were due in February 1964. The notes were the subject matter of a judgment by confession. A first mortgage in the amount of some \$51,000 was held by another creditor.

Foreclosure proceedings were commenced in June 1964. The decree of foreclosure was entered on February 23, 1965. There was a bankruptcy proceeding by the defendant Dwiggin which proceeding ultimately terminated other than by a discharge in bankruptcy. Other creditors apparently filed claims and a receiver was appointed. On April 3, 1965 the real estate was sold pursuant to an order in the foreclosure proceeding and as far as this record shows the defendant was a party to and appeared in the foreclosure proceeding. Audrie Adkins was the purchaser of the real estate at the foreclosure proceeding. On April 6, 1965, at the expiration of

the period of redemption she obtained title to the property as such purchaser from the sheriff of Greene County.

In July 1969 plaintiff instituted the instant proceeding alleging in conclusionary language fraudulent and collusive action by the defendants in connection with the 1964 foreclosure proceedings. In substance, the allegations are to the effect that "for purposes of overreaching, harrassing, and otherwise fraudulently damaging the plaintiff the said Illini Production Credit Association, a Corporation, did make other creditors and The Federal Land Bank of St. Louis parties defendant to the foreclosure suit knowing that there was sufficient personalty to pay creditors if properly handled and knowing that The Federal Land Bank of St. Louis had a first mortgage upon the said premises." The foreclosure proceedings were described as unnecessary, overreaching, malicious and the defendant Adkins is alleged to have purchased the real estate in pursuance of a conspiracy with Illini Production Credit to "ruin the plaintiff financially."

We undertake our review of the action of the circuit court by noting that essentially the plaintiff seeks by this action to collaterally attack the 1964 proceedings to which he was a party, of which he had notice, and in which proceeding he appeared. His complaint does not allege want of jurisdiction of the parties or the subject matter in the 1964 proceeding.

In the case of Wood v. First National Bank of Woodlawn, 383 Ill. 515, 50 N.E.2d 330, the court noted:

***If a judgment is collaterally attacked under such circumstances of jurisdiction, it is immaterial how irregular or erroneous its proceedings may have been. Such a judgment is binding on the parties and on every court unless reversed or annulled in a direct proceeding. (emphasis supplied) (All italicized).

If there is a total want of jurisdiction in a court, either as to the subject matter or as to the parties, its proceedings are an absolute nullity and no rights are created by them, and they may be pronounced void when collaterally attacked. (Citing People v. Sterling, 375 Ill. 354; Miller v. Rowan, 251 Ill. 374; People ex rel. Raymond v. Talmadge, 194 Ill. 67)."

As we review this record the quoted language from the Wood case is applicable here and indeed determinative of the substantive issue.

The trial judge in a memorandum filed in connection with his order stated that if there was in fact any fraud, collusion, or overreaching attendant upon the judicial proceedings for foreclosure, the remedy for such was direct attack by appeal. That remedy was available to the plaintiff and not pursued.

We are likewise in agreement with the trial court in his conclusion that this complaint is wholly insufficient to state a cause of action for fraud. The allegations with reference to fraud being pure conclusions with a want of factual allegation sufficient to sustain a cause of action. Lytton v. Cole, 54 Ill. App. 2d 161, 203 N.E.2d 590.

Finally, giving the most liberal construction permissible to this complaint, it does not contain allegations that warrant any relief to the plaintiff under section 72 of the Civil Practice Act. Relief from a final order is required to be filed within 2 years of the entry of the order with certain exceptions with reference to the plaintiff's disability or a totally void order, neither of which exceptions are alleged in this complaint. Masters v. Estate of Smythe, 124 Ill. App.2d 474, 259 N.E.2d 399. The

circuit court of Greene County was correct in its determination that the second amended complaint did not state a cause of action and the judgment entered is affirmed.

JUDGMENT AFFIRMED.

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

ABST.

CATHERINE M. PIERCE, also known)	
as CATHERINE M. PEARCE,)	
formerly CATHERINE M. WADE,	)	Appeal from the Circuit Court of the
	)	Twentieth Judicial Circuit,
Plaintiff-Appellee,	)	St. Clair County.
)	
-vs-)	
	)	Honorable Francis E. Maxwell,
ROBERT L. WADE,	)	Judge Presiding.
)	
Defendant-Appellant.))	

PER CURIAM:

This is an appeal of the trial court's judgment granting custody of a minor, Robert Ted Wade, to the mother, Catherine M. Pierce, plaintiff, subject to visitation rights of the father, Robert L. Wade, defendant.

The relevant facts are as follows: Robert L. Wade and Catherine M. Wade were divorced in February, 1969. A short time prior to the entering of a decree, Robert received a letter from his wife's attorney which stated: "Your wife has indicated you had some concern about her leaving the state, and I would like to advise you that your child cannot be taken from the jurisdiction of this court without first notifying you, and obtaining a court order allowing her to remove the child from this jurisdiction." A decree of divorce was entered. No explicit child custody determination was then made by the court. However, the mother took the child and the father was directed to pay child support. It was further ordered that court approval be obtained before the child be removed from Illinois.

In February, 1970, plaintiff married Clifford Ronald Pierce. Pierce had a record of arrests and convictions, a fact of which plaintiff claims to have been then unaware. The evidence discloses that while he was married to plaintiff, Pierce was arrested in Missouri for burglary. He was freed on \$8,000 bond which he forfeited in failing to appear at the preliminary hearing which had been docketed for January 8, 1971. Plaintiff testified that she was unaware of this arrest.

On or about January 3, 1971, Pierce, Plaintiff and Robert Ted Wade moved from Illinois to California. Neither defendant nor the Illinois authorities were notified.

Defendant had been regular in his child support payments until approximately October 1, 1970. From then until approximately June of 1971 he made deposits in a passbook savings account bearing the minor child's name as a joint owner.

When defendant learned that his child had been taken by plaintiff to California, he flew there and without the knowledge or permission of plaintiff returned the child with him to Illinois.

Defendant petitioned the court below for custody of the minor child. After a hearing, the trial judge entered an order denying the petition and vesting custody in plaintiff. Defendant appeals, presenting one issue for review: Whether the order of the trial court granting custody to the plaintiff was against the manifest weight of the evidence.

It has long been the law in Illinois that, in child custody cases, the "guiding star is and must be, at all times, the best interest of the child." *Nye v. Nye*, 411 Ill. 408, 105 N.E.2d 300. The trial court's task in such cases is to reach a decision designed to protect the child's best interests. *Morris v. Morris*, 44 Ill. 2d 66.

Once a custody determination has been made by the trial court, a court of review should not disturb it absent a showing of manifest injustice. *People v. Buckovich*, 39 Ill.2d 76, 233 N.E.2d 382. For although his exercise of discretion is subject to appellate review (*Cohn v. Scott*, 231 Ill. 556, 83 N.E. 191; *Aikin v. Aikin*, 109 Ill. App.2d 150), it is "difficult to reverse a trial court's decision because he is in a far better position to assess the demeanor of the parties and to judge their emotional stability." *Aikin v. Aikin*, supra; *Morris v. Morris*, supra. The trial court's decision is also supported by the general rule that "it is usual in such cases, due to the tender years of the child and in consideration of its best interests, to entrust its care and custody to the mother, she being a fit and proper person to rear the child." *Nye v. Nye*, supra. Usually, "a mother is better equipped to raise a child than is the father." *Carlson v. Carlson*, 80 Ill.App.2d 251.

The record disclosed that the child was well cared for and happy while in the custody of his mother. The trial judge found that the mother was a fit and proper person to have custody and care of the child and there was nothing in the record to indicate he was in error in so finding.

Accordingly, we find that in light of the facts on the record, the trial court did not abuse its discretion in awarding the custody of Robert Ted Wade to the plaintiff.

Judgment Affirmed.

PUBLISH ABSTRACT ONLY.

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

ABST.

At a session of the Appellate Court, begun and held at Elgin, on the 6th day of December, the year of our Lord one thousand nine hundred and seventy-one, within and for the Second District of Illinois:

Present -- Honorable GLENN K. SEIDENFELD, Presiding Justice
Honorable THOMAS J. MORAN, Justice
Honorable MEL ABRAHAMSON, Justice
HOWARD K. KELLETT, Clerk
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On December 22, 1971 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

FILED

No. 71-46

DEC 22 1971

HOWARD K. KELLET, Clerk
Appellate Court, 2d District

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

Abstract

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,)	
	)	Appeal from the Circuit
vs.	)	Court of the 15th Judi-
	)	cial Circuit, Lee
PAUL McCaffrey,	)	County, Illinois.
)	
)	
Defendant-Appellant.)	

PRESIDING JUSTICE SEIDENFELD delivered the opinion of the court:

The defendant, Paul McCaffrey, was indicted on April 16th, 1970 for the unlawful sale of marijuana (Ill.Rev.Stat. 1969, ch.38,par.22-3), alleged to have occurred on March 25th, 1970. He appeals from judgment of conviction after a jury verdict, and from the sentence of 10-12 years in the penitentiary.

This appeal is controlled by the opinion of the Illinois Supreme Court in The People v. McCabe, Supreme Court Docket #42674, filed October, 1971; rehearing denied November 24, 1971; 49 Ill.2d 338 (1971). See also, The People v. Hudson, Supreme Court Docket #43994, decided November 30, 1971; ___ Ill.2d ___

The judgment below is therefore reversed.

REVERSED.

ABRAHAMSON and MORAN, J.J. Concur.

2 I.A.³ 902

70-165

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

ABST.

At a session of the Appellate Court, begun and held at
Elgin, on the 6th day of December, in the year of our Lord
one thousand nine hundred and seventy-one, within and for the
Second District of Illinois:

Present -- Honorable WILLIAM L. GUILD, Acting Presiding Justice
Honorable THOMAS J. MORAN, Justice
Honorable MEL ABRAHAMSON, Justice
HOWARD K. KELLETT, Clerk
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On
December 21, 1971 the Supplemental Opinion of the Court was
filed in the Clerk's office of said Court, in the words and figures
following, viz:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

FILED

DEC 21 1971

HOWARD K. KELLETT, Clerk
Appellate Court, 2d District

PEOPLE OF THE STATE OF ILLINOIS)	
)	
Plaintiff-Appellee	)	Appeal from the 18th
	)	Judicial Circuit,
-vs-	)	Du Page County
)	
JOSEPH WAYNE PATTERSON	)	Hon. William J. Bauer,
	)	Judge presiding
Defendant-Appellant)	

SUPPLEMENTAL OPINION

MR. JUSTICE GUILD delivered the opinion of the court.

The conviction in this case was affirmed and we remanded the case to the Trial Court to conduct a hearing under the provisions of the "Cannabis Control Act" and report back to this court its findings within a short date.

Now, however, in view of The People v. Mc Cabe, Supreme Court Docket #42674, filed Oct. 1971; rehearing denied November 24, 1971, 49 Ill. 2d 338 (1971), and The People v. Hudson, Supreme Court Docket #43994, filed , there is no necessity for a hearing under the "Cannabis Control Act."

Therefore, the judgment of the trial court is reversed.

Judgment reversed.

MORAN, P.J. and ABRAHAMSON, J., concur.

70-257

UNITED STATES OF AMERICA

2 I.A. 902

ABST.

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held at Elgin, on the 7th day of December, in the year of our Lord one thousand nine hundred and seventy, within and for the Second District of Illinois:

Present -- Honorable GLENN K. SEIDENFELD, Acting Presiding Justice
Honorable MEL ABRAHAMSON, Justice
Honorable WILLIAM L. GUILD, Justice
HOWARD K. KELLETT, Clerk
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On September 14, 1971 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

SEP 11 1971

HOWARD K. KELLETT, Clerk
Appellate Court, 2d DistrictIN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

Abstract

LOIS MARY DI PAOLO,)	
)	
Plaintiff, Counter)	
Defendant-Appellee,)	
	)	Appeal from the Eighteenth
vs.	)	Judicial Circuit, DuPage
	)	County, Illinois.
ANTHONY MICHAEL DI PAOLO,)	
)	
Defendant, Counter)	
Plaintiff-Appellant.)	

MR. JUSTICE SEIDENFELD delivered the opinion of the court:

Anthony Michael Di Paolo appeals from a judgment modifying a previous decree for divorce as it related to the custody of the five children of the parties.

The principal claim by the husband is that the court did not base the modification of child custody in the order (giving custody to each of the parents at specified times) on a material change in circumstances affecting the welfare of the children.

On May 22nd, 1968, a decree of divorce was entered in behalf of the husband on his counterclaim for divorce in a cause heard as a default and under a stipulation settling the property rights of the parties and agreeing that custody of the children be in the husband. The complaint had charged adultery and also an attempt to take the life of the counterclaimant, but evidence was only heard on the latter charge. The decree, as entered, found Lois Mary Di Paolo unfit to have the custody of the children

and found the husband fit to have the custody of the children, then age 2, 5, 7, 9, and 10 years respectively.

Thereafter the parties were in court on numerous occasions in disputes over visitation rights, culminating in the wife filing a petition for change of custody on January 13th, 1970. After a number of hearings the modified decree was entered on August 18th, 1970.

We have carefully examined the hundreds of pages of testimony in the record. Without setting the evidence forth in detail, we are satisfied that there was sufficient evidence for the court to determine, within a reasonable exercise of its discretion, both that the mother had become fit to have the custody of the children and that conditions affecting the welfare of the children had sufficiently altered subsequent to the default decree to sustain the court's ruling. The requirement insisted on by the court that the children be maintained in their present neighborhood under living arrangements which the court deemed adequate was, we think, a reasonable solution under circumstances indicating that both parents were interested in the welfare of the family and could best contribute to their well-being by the method decreed by the court. The husband argues that the judge ruled on the basis of the mother's present fitness without considering whether there were altered circumstances affecting the welfare of the children sufficient to justify taking them, in part, from the custody of the parent to whom they were given under the decree and who was not shown to be subsequently unfit. We do not so conclude from the entire record. The present fitness of the mother was established by a large amount of testimony, much of which also bore on the welfare of the children. Mrs. Di-

... in which the children's ...

... of the children, for

example, evidence of the difficulties which the father encountered after the decree in securing a housekeeper to aid in taking care of the young children in a stable and orderly fashion; evidence of the mother being asked to move into the house after the entry of the decree at the father's request to get the children ready for a vacation and to bring order to the household; evidence of the interest and aid which the mother has shown in relation to the children's personal problems, their dress and cleanliness and in helping them with their schooling (coupled with her educational advantages in overseeing this important phase of the children's welfare).

We believe the result below was justified under rules of law which are not in dispute and have become so well settled that there is no need to restate them here. E.g. Nye v. Nye, 411 Ill. 408, 414, 416 (1952); Collings v. Collings, 120 Ill.App.2d 125, 128, 129 (1970); Vysoky v. Vysoky, 85 Ill.App.2d 306, 311 (1967); Maroney v. Maroney, 109 Ill.App.2d 162, 171 (1969).

The husband claims that he was prejudiced in his attempted proof of the continued unfitness of his wife because he was not given a continuance to present a witness who was the alleged paramour of the wife at the time of the divorce. The deposition of the witness taken in a collateral suit does not indicate that he could offer any material evidence relating to Mrs. Di Paolo's alleged unfitness subsequent to the date of divorce decree, and the court therefore acted within its discretion in denying the continuance. The exercise of the discretion of the trial court deciding a motion for continuance will not be reviewed on appeal unless the discretion has been manifestly abused. Condon v. Brockway, 157 Ill. 90, 92 (1895). We find no manifest abuse of discretion here.

The further claim of the husband that the order requiring him to pay \$90.00 per week as total child support of the period

in which the minor children are in the mother's custody is without merit. Under the circumstances which were before the court, and including Mr. Di Paolo's admissions that he earned approximately \$12,000 a year, we will not reverse the case because there was no special support hearing. It is obvious, from the record, that \$18.00 per week per child could, in no way, be considered an unreasonable award.

The judgment below contained a finding that the children be maintained in their same neighborhood. Counsel for the husband argues that this could not be enforced without a similar ordering provision which the court refused to add. Again we cannot agree. The court found that adequate housing arrangements had been made "to meet the requirement of court." The language is sufficient for enforcement under the continuing jurisdiction of the court to require compliance with its decrees.

Counsel for the wife has filed a motion to tax costs for printing an additional abstract. This will be allowed in part. The appellant's abstract of record contains partial-and then only adverse-excerpts from merely three pages of almost one hundred pages of transcript. This does not comply with Supreme Court Rule 342(c)(4) in letter or in spirit. However, the additional abstract errs in the other direction in its inclusions and also does not comply with the Rule. We will, therefore, tax one-half of the cost of the item of the additional abstract against appellant.

The judgment below is affirmed.

AFFIRMED

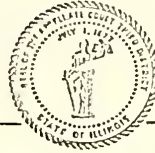
Abrahamson, J. and Guild, J. concur.

12 I.A. 948

71-109

STATE OF ILLINOIS

PEOPLE VS. MOSE W. KILLEBREW



ARST.

APPELLATE COURT THIRD DISTRICT
OTTAWA

At a term of the Appellate Court, begun and held at
Ottawa, on the 1st Day of January in the Year of our Lord
one thousand nine hundred and seventy-one, within and for the
Third District of Illinois:

Present—

HONORABLE JAY J. ALLOY, Presiding Justice

HONORABLE ALLAN L. STOUDER, Justice

HONORABLE ALBERT SCOTT, Justice

JOHN E. HALL, Clerk

JAMES A. CALLAHAN, Sheriff

BE IT REMEMBERED, that afterwards on

NOVEMBER 5, 1971 the Opinion of the

Court was filed in the Clerk's Office of said Court, in the
words and figures following, viz:

In the
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,)	
	)	Appeal from the Circuit Court
Plaintiff-Appellee,	)	of Kankakee County.
)	
vs.)	
)	
MOSE KILLEBREW,	)	Honorable
	)	David R. Oram,
	)	Presiding Judge.
Defendant-Appellant.)	

Abstract

SCOTT, J.

The defendant, Mose Killebrew, was convicted of the crime of armed robbery in Kankakee County and sentenced to a term of imprisonment of not less than five nor more than ten years.

Subsequent to conviction a court appointed attorney filed a petition for a post conviction hearing on behalf of the defendant and the defendant at a still later date filed a pro se post conviction petition. Both of the petitions for post conviction relief were denied and Bruce Stratton of the Illinois Defender Project was appointed to represent the defendant in the appeal of this ruling. Said counsel has now filed a motion for leave to withdraw and in support thereof, pursuant to Anders v. California, 386 U. S. 738, states that an appeal would be wholly frivolous and could not possibly be successful.

An examination of the record discloses that the petitioner was arrested on January 7, 1969, on a charge of armed robbery and incarcerated in the Knox County jail in default of bail. Subsequent to his arrest two indictments, 69-Y-561 and 69-Y-562, were returned by the Grand Jury charging petitioner with armed robbery. Petitioner was brought to trial on indictment 69-Y-561 on May 5, 1969, being

118 days after his arrest. Prior to voir dire the trial judge mistakenly read the indictment in 69-Y-562 to the veniremen and on motion of defense counsel a mistrial was declared. Following the declaration of the mistrial the trial judge gave the defendant the option of proceeding to trial immediately with the same veniremen before whom the mistrial was declared or having the case set over to the next jury calendar. Defense counsel objected to proceeding in either manner, contending that the trial should be held immediately but with a new venire; this objection was overruled and the case was set over to the next jury calendar.

On June 11, 1969, 154 days after his incarceration and 36 days after the declaration of a mistrial, the defendant was again brought to trial on 69-Y-561. The defense counsel made a motion that the defendant be released under the 120 day rule (Ill. Rev. Stat., 1969, Ch. 38, Sec. 103-5 (a)) but this motion was denied. Defendant was then acquitted by the jury on the charge contained in indictment number 69-Y-561, but was remanded to the custody of the sheriff of Kankakee County pending trial on indictment 69-Y-562.

On July 21, 1969, being 205 days after his incarceration, the petitioner was brought to trial on the charge contained in indictment 69-Y-562 over his objection that he should be released under the 120 day rule. Upon his conviction the petitioner was sentenced as heretofore stated to a term of imprisonment of not less than five years nor more than ten years.

The successful motion for a mistrial by the defendant broke the term and started the 120 day period running anew (People v. Wade, 62 Ill. App. 2d 481, 210 N.E. 2d 791). The prosecution, however, must bring the defendant to trial within a reasonable time after the declaration of mistrial (People v. Eichert, 124 Ill. App. 394) and the court has held that 55 days is a reasonable period of time and particularly if the defendant is unable to show some actual

prejudice arising from the delay. See People v. Hudson, 46 Ill. 2d 177, 263 N.E. 2d 473.

In the case before us there was a lapse of 36 days between the declaration of the mistrial and the new trial and there is no allegation of any prejudice resulting to the defendant. Such a period would therefore appear to us to be reasonable.

Section 103-5 (e) of the Criminal Code (Ill. Rev. Stat. 1969, Ch. 38, Sec. 1-3-5 (e)) provides that if a person is in custody simultaneously on multiple charges in the same court he shall be tried on at least one charge within 120 days, and within 160 days from the disposition of the first charge on the remainder of the charges. In the case before us the defendant was brought to trial within 120 days in the case of 69-Y-561. He then made a successful motion for a mistrial and thereby broke the running of the 120 day period and he was thereafter tried again within a reasonable period, to-wit, 36 days, and was found not guilty. He was thereafter tried and convicted on the second charge, being case 69-Y-562, within 160 days from the disposition of his first case and in fact only 41 days had expired.

It should further be noted that there was no hearing held on either of the post conviction petitions filed on behalf of the defendant, but counsel for the defendant agreed with the State that only legal issues were involved and the court could decide the matter on the submission of briefs. The defendant in the post conviction petition has the burden of proof and his failure to produce any evidence on disputed factual matters means that he has failed to meet that burden. (People v. Thomas, 20 Ill. 2d 603, 170 N.E. 2d 543. Therefore the allegations set forth by the defendant in his petitions for post conviction hearing were thereby

waived and have no relevance in this appeal.

The post conviction statute applies only to constitutional deprivations leading to a finding of guilty (Ill. Rev. Stat., Chap. 38, Sec. 122 et seq.). Although this statute implements the speedy trial provision of the Illinois constitution the statute is not coextensive with that right (People v. Love, 39 Ill. 2d 436, 255 N.E. 2d 819) and a violation of the statute does not of itself create a constitutional question (People v. Hartman, 408 Ill. 133, 96 N.E. 2d 449). An allegation in a post conviction petition that the trial court improperly allowed a continuance which extended the term does not allege a denial of a constitutional right and the court properly dismissed the petition. (People v. Farley, 408 Ill. 288, 96 N.E. 2d 453.

The court therefore after examining the factual situation presented in this matter, along with accepted law pertaining to post conviction hearings, can only conclude that the case of Anders v. California, supra, applies and therefore the motion of the defendant's counsel appointed for purpose of appeal in this cause should be granted, since there is no basis upon which an appeal could be sustained. The motion of Bruce Stratton of the Illinois Defender Project to withdraw is approved and the judgment of the circuit court of Kankakee County is hereby affirmed.

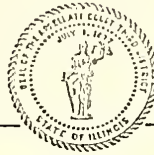
Judgement affirmed.

ALLOY, P.J., and STOUDER, J., concur.

71-93

STATE OF ILLINOIS

PEOPLE VS. DONALD DENNING



ABST.

APPELLATE COURT THIRD DISTRICT
OTTAWA

At a term of the Appellate Court, begun and held at
Ottawa, on the 1st Day of January in the Year of our Lord
one thousand nine hundred and seventy-one, within and for the
Third District of Illinois:

Present—

HONORABLE JAY J. ALLOY, Presiding Justice

HONORABLE WALTER DIXON , Justice

HONORABLE ALBERT SCOTT, Justice

JOHN E. HALL, Clerk

JAMES A. CALLAHAN, Sheriff

BE IT REMEMBERED, that afterwards on
NOVEMBER 23, 1971

_____ the Opinion of the
Court was filed in the Clerk's Office of said Court, in the
words and figures following, viz:

In The
APPELLATE COURT OF ILLINOIS
Third District
A. D. 1971.

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Whiteside County.
)	
vs.)	
	)	Honorable
DONALD DENNING,	)	John B. Cunningham
	)	Presiding Judge.
Defendant-Appellant.)	

ALLOY, P. J.

Abstract

Defendant Donald Denning signed a written waiver of jury and a plea of guilty to the offense of Driving While License Suspended. He was sentenced to nine months at the State Penal Farm at Vandalia. No transcript or report of proceedings was made or filed in the cause. The record shows that defendant received an Illinois Uniform Traffic Citation which charged him with the offense of operating a motor vehicle while his license had been suspended. As indicated, he signed a jury waiver and entered a plea of guilty. His appearance, waiver and plea of guilty was in a printed form on the traffic citation which read, "I, the undersigned, do hereby enter my appearance on the complaint of the offense charged on other side of this ticket. I have been informed of my right to a trial, that my signature to this plea of guilty will have the same force and effect as a judgment of court, and that this record will be sent to the Secretary of State (or of the State where I received my license to drive). I do hereby PLEAD GUILTY to said offense as charged, WAIVE my right to a HEARING by the court, and agree to pay the penalty prescribed for my offense."

On appeal in this Court, defendant contends that the court erred in accepting his plea of guilty without first admonishing him with regard to the nature of the offense with which he was charged and of the minimum and maximum penalties applicable. Defendant contends that reversal is required here by reason of the failure to furnish a record, showing that defendant was admonished in accordance with Supreme Court Rule 402, and, also, that the court ascertained whether the plea was voluntary, and inquired into the factual basis for the plea. The parties agree that no transcript or report of proceedings was made or filed in this traffic violation case. We note also that at the time of the acceptance of defendant's plea of guilty, Supreme Court Rule 402(e) was in effect and provided: "In cases in which the defendant is charged with a crime punishable by imprisonment in the penitentiary, the proceedings required by this Rule to be in court shall be taken verbatim, transcribed, filed, and made a part of the common law record." We find no provision requiring that traffic violations which are not punishable by imprisonment in the penitentiary require that the proceedings be taken verbatim, transcribed and filed as part of the record. The maximum incarceration in a traffic offense case is one year (1969 Illinois Revised Statutes, Ch. 95-1/2 Par. 6-303).

We note that in the record filed in this cause, it appears in a prior proceeding, where defendant was also charged with driving while license was suspended, a sentence of 90 days was imposed. That sentence was to be served concurrently with the nine-month sentence involved in the instant case. Defendant was shown to have appeared in court in the prior case at which time the court clearly explained to defendant the consequences of entering a plea of guilty in that cause. At that time the court expressly stated, "You understand the penalty under the statute for this offense is not less than seven (7) days nor more than one (1) year, and/or a fine up to the amount of One Thousand (\$1,000.00) Dollars." Defendant indicated at such time that he understood. This admonition was apparently given on the 6th

day of April, 1971. Defendant was arrested on the charge involved in the present case on April 24, 1971 (after he had failed to appear in court on the previous charge on April 20, 1971, as directed). The latter information appears from a motion filed in this Court to set reasonable bond on appeal and objections thereto, all made part of the record in this Court. It, therefore, appears that defendant, in fact, had knowledge of the possible sentence and consequences of a plea of guilty in this cause, since the charge was the same as in the present case. We have simply referred to the record in the previous case as a matter of information chiefly as related to the supplementary question of defendant's request to reduce the sentence. We are not, however, determining the issue on either of the points raised by defendant on the basis of the record in the previous case.

By reciting the supplementary facts herein referred to, we do not mean to imply that the record in the cause involving a traffic violation is required to show affirmatively that compliance was had with Rule 402 of the Supreme Court. Since no verbatim transcript was made, or apparently required in this case, the procedure specified in Rule 612(c) which makes the Civil Appeals Rules applicable in criminal appeals in certain situations should have been adhered to by defendant. If no verbatim transcript is available, the procedure set forth in Supreme Court Rule 323(c) and (d) should be followed. No attempt was made by appellant to comply with such rule, which would have permitted him to submit, in lieu of a transcript, either a proposed report of proceedings or an agreed statement of facts. We believe that under the terms of such Rules, the Civil Appeals Rules referred to apply and compliance with Supreme Court Rule 323(c) and (d) should have been undertaken. Appellant has the burden of initiating such procedure under such rule. Defendant had ample opportunity to follow such procedure while his appeal was pending. We, therefore, find there is no basis for a reversal based upon the contention that a record of proceedings in the court should have been furnished by the State.

Defendant also contends that the sentence imposed upon him was excessive and disproportionate to the offense and should be reduced. As we have indicated, defendant filed a motion in this Court to set bond, which was denied. Motion and objections thereto were filed in this Court, and indicate that defendant had a record of at least four convictions of driving on a suspended license. The objections specify that defendant actually has a record of a total of 10 convictions including having no valid operator's license, deceptive practice, failure to reduce speed to avoid an accident, leaving the scene of an accident, and operating a motor vehicle under the influence of alcohol. We have no way of knowing how many independent or separate acts were involved in these proceedings, but it is indicated by defendant in his own motion that there were at least four separate violations of driving on a suspended license. Under the circumstances we do not believe we would be justified in modifying or changing the sentence imposed by the Circuit Court of Whiteside County. This cause will, therefore, be affirmed.

Affirmed.

Scott, J. and Dixon, J. concur.

71-73

STATE OF ILLINOIS

PEOPLE VS. MICHAEL J. FRAGALE and
JAMES M. OBERTS



ARST.

APPELLATE COURT THIRD DISTRICT
OTTAWA

At a term of the Appellate Court, begun and held at
Ottawa, on the 1st Day of January in the Year of our Lord
one thousand nine hundred and seventy-one, within and for the
Third District of Illinois:

Present—

HONORABLE JAY J. ALLOY, Presiding Justice

HONORABLE WALTER DIXON, Justice

HONORABLE ALBERT SCOTT, Justice

JOHN E. HALL, Clerk

JAMES A. CALLAHAN, Sheriff

BE IT REMEMBERED, that afterwards on

DECEMBER 2, 1971 the Opinion of the

Court was filed in the Clerk's Office of said Court, in the
words and figures following, viz:

In The

APPELLATE COURT OF ILLINOIS

Third District

A. D. 1971.

PEOPLE OF THE STATE OF ILLINOIS,)	
	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
	)	McDonough County.
vs.)	_____
)	
MICHAEL J. FRAGALE and	)	Honorable
JAMES M. OBERTS,	)	Edwin Becker
	)	Presiding Judge.
Defendants-Appellants.)	

PER CURIAM

Abstract

Defendants Michael J. Fragale and James M. Oberts were found guilty in a bench trial on the charge of Theft (1969 Illinois Revised Statutes, Ch. 38, §16-1(a)). The Circuit Court of McDonough County then sentenced each of the defendants to one year of probation and to pay costs and a fine of \$100.

It appears from the evidence that on the night of April 17, 1970, Judy Anderson, a student at Western Illinois University, and her friend Janiye Mattson, were at the King's Castle dance hall in Macomb. According to the testimony of Judy Anderson, she and her friend Janiye left their purses on the table and went to the restroom. Thereafter according to the testimony of the manager of the dance hall, and Jean McCombs, a patron, defendants (two young men) approached an empty table upon which there were approximately six purses. They then placed a windbreaker over two of the purses, removed the purses to the floor, wrapped them in the windbreaker, and started for the exit. The manager then attempted to catch the defendants.

Jerry McCombs, a patron who had been following and watching the defendants for approximately half an hour before the incident, also confronted defendants. Defendants then threw the purses behind the jukebox and ran. The manager and McCombs had both been watching the young men for a half hour prior to the incident. The manager, after he had obtained the purses from behind the jukebox, apparently gave the purses to Janiye Mattson. Judy Anderson stated that Janiye brought her purse to her while she (Judy Anderson) was still in the restroom. Janiye Mattson did not testify.

On appeal in this Court, the defendants assert a number of grounds for reversal including the allegation that the State did not prove beyond a reasonable doubt that defendants exercised unauthorized control over the alleged objects of the theft, and that the State failed to prove ownership of the objects of the theft. A motion for a directed verdict as well as a post-trial motion were filed with the court and each was denied by the trial court. No evidence was presented by defendants.

To establish the crime of theft it must be shown that there was unauthorized control over the object of the theft and that the taking and conversion of the property is without consent of the owner. It does not include the taking of property with intent to use it temporarily and then return it to the owner (PEOPLE v. QUINN, 411 Ill. 97, 103 N.E.2d 81).

As stated in the QUINN case, supra, we ordinarily attach great weight to the determination of the trial court where the court has been the trier of fact. In criminal cases such as we have before us, however, it is vital that all elements be established so that the conviction is based on evidence which indicates the commission of the crime by defendant who is convicted, "beyond all reasonable doubt". In the case before us, it appears that there is a gap in the required chain of proof. Judy Anderson was in the restroom during the entire incident. She, therefore, could and did testify only that her friend Janiye brought her purse to her in the restroom. Because

Judy Anderson was not present she could not, of course, establish that defendants took her purse. Her friend, Janiye Mattson, whose testimony was requisite to complete the chain of evidence, and who might have testified that she received the purse from the manager and gave it to Judy Anderson, did not testify. No other witness gave any description of Judy Anderson's purse or of the two purses which were taken. In such state of the record it appears that none of the State's witnesses who were called to testify were able to say that the purse of Judy Anderson was taken. From the record we cannot conclude that a legitimate inference of such taking was established.

As we have indicated, while we normally give great weight to the determination by the trial court, and understand the problem which confronted the trial court, we have an obligation to require, in this case, as in all cases which come before us, that the proof of the crime charged be made specifically, and in such manner that there is no reasonable doubt of the guilt of the defendants so convicted. The fact that evidence might have been available for such purpose and was not produced cannot now aid this Court in its determination. We, therefore, find that we have no alternative but to reverse the judgment entered in the trial court in this case.

On the basis of the record, therefore, we must conclude that defendants' motion for a directed verdict or the post-trial motion asking for discharge of defendants should have been granted. The judgments entered in this cause as against defendants Michael J. Fragale and James M. Oberts, are, therefore, reversed.

Judgments reversed₂



2 I.A.³/074

MAR 20 1972

55564

ALBERT GASKIN,

Plaintiff-Appellant,

vs.

TRACY GRAY,

Defendant-Appellee.

ARST.

APPEAL FROM THE CIRCUIT

COURT OF COOK COUNTY.

Hon. Richard H. Jorzak,
Presiding.

MR. PRESIDING JUSTICE McNAMARA delivered the opinion of the court:

Plaintiff, a real estate broker, brought this action to recover a commission for the sale of a certain parcel of real estate owned by defendant. Defendant moved to strike the amended complaint for reasons relating to his bankruptcy. The trial court granted defendant's motion to strike the complaint and dismissed plaintiff's action. This appeal follows.

Defendant has not filed an appearance or brief in this court. A reviewing court may, in such circumstances, reverse the judgment of the trial court without further explanation. Spears v. Spears, 45 Ill.App.2d 167, 195 N.E.2d 237. However this court has fully examined the record to determine the merits of the instant appeal. See Lynch v. Wolverine Insurance Co., 126 Ill.App.2d 192, 261 N.E.2d 466.

Plaintiff's amended complaint alleged that on November 3, 1967 defendant filed a voluntary petition in bankruptcy. On December 27, 1967, the bankruptcy court entered an order discharging defendant of all his provable debts. Eleven months later, November 30, 1968, defendant entered into a written brokerage agreement with plaintiff. Plaintiff became exclusive agent for the sale of a certain parcel of real estate which defendant warranted he owned. Plaintiff was to receive a commission or, if the property was sold by someone else, an amount assessed as liquidated damages.

The complaint further charged that plaintiff secured purchasers for the property and tendered their offer to defendant. At that time, defendant informed plaintiff that the property was

being held by the trustee in bankruptcy, but assured plaintiff that he would personally guarantee a commission under the terms of the agreement. At defendant's request, plaintiff appeared at the public sale of the property conducted by the trustee and submitted the offer which he had secured. At that sale the trustee informed plaintiff that he could not be paid from the bankrupt estate. Defendant again promised to personally pay plaintiff if he would make the bid as per the offer he had secured. The property subsequently was sold to plaintiff's purchasers. Another parcel of realty owned by defendant was removed from the public sale because the price obtained by plaintiff was more than sufficient to satisfy all of the obligations of the bankrupt estate. An amount of money, in excess of plaintiff's claim, was also returned to defendant.

Defendant's motion to strike the complaint stated that plaintiff was aware of the bankruptcy proceeding but filed no claim, thus discharging defendant from the obligation. Defendant also claimed that the present action was an attempt to re-adjudicate the issues which were determined in the bankruptcy proceeding. The complaint was dismissed by the trial court on the ground that the debt was provable in bankruptcy and was, therefore, barred as a claim against defendant.

In order for a creditor's claim to be discharged by bankruptcy, the claim must be provable against the bankrupt estate. To be provable against the bankrupt estate, the claim must exist at the time the petition in bankruptcy is filed. 11 U.S.C. §103; Ingels v. Boteler, 100 F.2d 915; aff'd, 308 U.S. 57.

Under the foregoing reasoning, plaintiff's claim was not provable against defendant's bankrupt estate. The contract between the parties was entered into nearly a year after defendant filed his petition and was discharged in bankruptcy. Since the claim did not exist at the time the petition in bankruptcy was filed, it could not properly have been adjudicated in the bankruptcy proceedings. Thus it was not necessary for plaintiff to petition that forum for the recovery of his claim. The trial court, therefore, erred in

striking plaintiff's amended complaint and in dismissing the cause of action.

Accordingly, the order of dismissal is reversed and the cause remanded for further proceedings not inconsistent with the holdings of this opinion.

Order reversed and
cause remanded.

DEMPSEY and MCGLOON, JJ., concur.



2 I.A.³ 1081

MAR 20 1971

55282

ABST.

MAR 20 1972

PEOPLE OF THE STATE OF ILLINOIS,)	
Plaintiff-Appellee,	)	APPEAL FROM THE CIRCUIT
	)	COURT OF COOK COUNTY.
vs.)	
)	
MELVIN MITCHELL,	)	Hon. Robert J. Collins,
	)	Presiding.
Defendant-Appellant.)	

MR. JUSTICE GOLDBERG delivered the opinion of the court:

Defendant, Melvin Mitchell, was indicted for armed robbery. Ill.Rev.Stat. 1967, ch.38, par.18-2. A jury trial resulted in a disagreement and a mistrial was declared. At a second trial, the jury returned a verdict of guilty. Defendant was sentenced to a penitentiary term of from 20 to 40 years to be served consecutively after another sentence of from eight to 20 years for armed robbery previously imposed, on July 16, 1968.

On his appeal to this court, defendant contends that he was not proved guilty beyond a reasonable doubt; that he was denied a fair trial by the introduction of an altered photograph into evidence; that the trial court erred in permitting testimony from which his prior criminal record could be inferred; that he was denied legal assistance due to inadequacy of his appointed counsel; and that the sentence was excessive. We will consider each contention in order after a statement of the facts.

The evidence shows that a robbery took place in a food store in Chicago shortly after noon on December 23, 1967. The assistant store manager testified that he was talking on the telephone when he heard a "scuffle" near the front of the store. He saw the store manager, struggling with a man. As he went to help the manager, another individual, identified by the witness

as the defendant, approached him and said, "Don't get involved, somebody might get hurt." The witness continued to the front of the store to assist the manager. He noticed that the man struggling with the manager had a pistol. He then attempted to return to the telephone to call the police. Defendant again addressed the witness and said, "Don't get involved, innocent people might get hurt." Disregarding defendant, he proceeded to the telephone. Defendant Mitchell then said, "Hang up the telephone and just stand there," and he placed his right hand in the left portion of his jacket. At this point in his testimony the witness identified the defendant, Melvin Mitchell, as the man who made the statements and the gesture.

The witness testified further that the other man, later identified as Wilbur Wright, took the manager into the office. The manager gave Wright money from the safe. The witness heard the defendant tell Wright, "Come on, you have got enough, let's go."

On cross-examination, the witness stated that he had described defendant to the police as a male Negro, approximately five feet five inches or five feet six inches tall, weighing around 155 pounds and 45 to 50 years old. He testified further that defendant needed a shave and that the color of his hair and beard was gray. The defendant was wearing a dark hat, dark trousers and a dark blue jacket. He could not recall whether he told the police that defendant had a moustache.

The manager of the store testified that he was checking out groceries when a man, later identified as Wilbur Wright, approached and pulled out a .38 caliber pistol. The witness grabbed Wright's hand and tried to wrestle the weapon away. After a brief struggle, Wright ordered him into the store office. There

he opened the safe and gave Wright \$1300. The witness identified the defendant, Melvin Mitchell, as the man standing behind the assistant manager during the robbery. He testified that Wright walked out of the office and placed the money in a paper bag. He also heard the defendant say to Wright, "Let's go, we've got enough." The testimony is that it took about ten minutes for completion of the robbery.

On cross-examination, the manager testified that he described Mitchell to the police as being a male Negro, five feet five inches tall, about 45 to 50 years old and wearing glasses. He could not recall whether he told the police that defendant had a moustache or the length of defendant's hair.

Both of these witnesses testified that they had identified defendant by means of a photograph shown to them by the police. They selected his picture from a group. It was stipulated that the photograph was taken in October of 1965. It showed three views of defendant, both with and without glasses. This picture will later receive additional comment.

A defense witness testified that she had known defendant for four or five years prior to the date in question. On that date, defendant had been at her apartment helping her decorate for Christmas. She and defendant were very "tight". Mitchell never left her apartment on December 23, 1967, and he stayed there through the Christmas season. On cross-examination, the witness testified that defendant was helping her paint her apartment on that date. She further testified that defendant always had his hair low-cut and that he wore glasses for reading.

Wilbur Wright was the only other witness for defendant. He stated that he was involved in the robbery on December 23, 1967. The defendant, Melvin Mitchell, was not with him on the

day he committed the robbery. He had only heard of Mitchell prior to that day and they subsequently met when both were in the same tier in Cook County Jail. On cross-examination, Wright testified that a man named Blood helped him in the robbery. He believed Blood was dead and could not recall his full name. He stated that he knew defendant in jail as a convict friend, someone to talk to. On redirect examination, Wright further stated that he and defendant spent four or five months together in Cook County Jail. It was proved that Wright had previously been convicted of armed robbery four times.

A checker employed at the store testified for the State in rebuttal. She witnessed a scuffle between the manager and Wilbur Wright. She also saw defendant Melvin Mitchell standing in an aisle and saw him with his hand inside his jacket. She heard defendant warn the assistant manager and say that he wouldn't want him to get hurt. She saw defendant push him against the ice-cream freezer. The witness gave Wright a paper bag into which he placed a cloth bag with the money in it. As Wright and defendant left, the former said, "Don't do anything foolish."

On cross-examination, this lady stated that defendant was about five feet six inches or five feet seven inches tall and that Wright was five feet seven inches tall with a goatee. She further testified that there were three men involved in the robbery. She told the police that there were only two men and that defendant was wearing a dark jacket and a small hat and that he wore glasses and either had or appeared to have a moustache. She subsequently identified defendant from photographs provided by the police. She did not know that two other persons had selected the same picture. On redirect examination, the witness testified that the third man did not come into the store but stood by

the front door and never moved from there. She stated that defendant needed a shave and had gray hair protruding at his temples.

In arguing lack of proof beyond a reasonable doubt, defendant centers his attack upon the identifications and also depends upon the evidence of alibi. The record shows that the robbery took place in broad daylight. The incident took about ten minutes and all three witnesses who identified defendant had an excellent opportunity to observe him. The method of identification by use of police photographs, selected by the witnesses from a group shown by the police, has been consistently approved by reviewing courts. *People v. Covington*, 47 Ill.2d 198, 204; *People v. Wooley*, 127 Ill.App.2d 249, 253. This method was particularly proper in the case at bar because there is no showing or suggestion of any procedure which might be suspected as being "impermissibly suggestive." See *People v. Covington*, 47 Ill.2d 198, 204 citing *Simmons v. United States*, 390 U.S. 377, 384, 19 L.Ed.2d 1247, 1253, 88 S.Ct. 967, 971.

Defendant's counsel on appeal attacks the identification by bringing out discrepancies in the testimony of the witnesses. In this regard, defendant's trial counsel, who brought these matters to the attention of the jury, was undoubtedly assisted by a transcript of the previous trial which he obtained in behalf of defendant at the State's expense. We have carefully reviewed the record with reference to these alleged variations in the testimony. We conclude that all of them, without exception, are minor discrepancies which do not result in the creation of reasonable doubt concerning any of the identifications.

The courts of Illinois have repeatedly held that where an identification is positive, precise accuracy in describing facial

characteristics is unnecessary. *People v. Catlett*, 48 Ill.2d 56, 63; *People v. Ruderson*, 129 Ill.App.2d 271, 278. Similarly, our courts have held that "[s]light discrepancies do not destroy the credibility of eyewitnesses but only go to the weight to be given their testimony." *People v. Willis*, 126 Ill.App.2d 348, 354. Specifically, the failure of a witness to notice the presence or absence of a moustache, or of other physical features or characteristics, has been held to be a minor discrepancy. *People v. Luckey*, 126 Ill.App.2d 15, 28; *People v. Howard*, 112 Ill.App.2d 167, 171, 173; *People v. Ford*, 89 Ill.App.2d 69, 78, 79 cert. denied 393 U.S. 942.

In any event, it has been consistently and properly held for many long years that identification of a defendant in a criminal case is a question of credibility which is to be resolved by the trier of fact. *People v. Stringer*, 129 Ill.App.2d 251, 262; *People v. Holt*, 124 Ill.App.2d 198, 201; *People v. Witcher*, 121 Ill.App.2d 57, 60; *People v. Tucker*, 118 Ill.App.2d 136, 139. In this case at bar, determination of the weight of the identification of defendant by three eyewitnesses was a question for decision by the jury.

As regards the effect of the alibi testimony, the principle is applicable that where there is identification evidence opposed by testimony tending to prove an alibi, it is the duty of the jury to resolve the conflict. The jury was not required to accept the alibi in lieu of the strong identification testimony. Positive identification is sufficient to sustain a guilty verdict even against uncontradicted evidence of an alibi. *People v. Ruderson*, 129 Ill.App.2d 271, 279; *People v. Johnson*, 123 Ill. App.2d 69, 77; *People v. Habdas*, 94 Ill.App.2d 330, 338.

Defendant's alibi was supported by one witness who was admittedly using intoxicants on the day of the robbery and by

another who had recently been convicted four times for armed robbery. We are convinced that the verdict of this jury is strongly supported by evidence beyond reasonable doubt.

Defendant's next contention revolves about a police photograph of defendant showing him in three different poses. This photograph was received in evidence over objection. Prior to its receipt, the trial court directed that it be altered by blocking out or obliterating the date and police identification numbers which had appeared on two of the three poses. Defendant contends that this prejudiced the jury against him because it led them to speculate as to the nature and content of the eliminated material.

In two decided cases, considered in the briefs of both parties, it has been held that this type of photograph would not be prejudicial in its original condition, which indicated a prior arrest of defendant by showing a date and police identification. *People v. Maffioli*, 406 Ill. 315, 322; *People v. Purnell*, 105 Ill. App.2d 419, 422. The theory is that the picture from which the identification is made is important and necessary because it serves to corroborate the testimony of the identification witnesses. It is interesting to note that in a case previously decided by this court, we rejected an attack against a similar photograph because the date and police legend had not been eradicated. *People v. Johnson*, ___ Ill.App.2d ___, 273 N.E.2d 503. We conclude that the obliteration of the information in question from two poses of this photograph did not prejudice defendant in any manner.

As above pointed out, defendant called as his own witness Wilbur Wright, who had been convicted for perpetration of the robbery in question. As might be expected, direct examination

of this witness showed that he had previously been confined to the County Jail. Cross-examination by the State brought out that he and defendant had become acquainted as fellow convicts in the jail. Defendant contends here that this cross-examination by the State was prejudicial.

When defendant called Wilbur Wright as a witness, his direct examination necessarily opened the door with reference to this subject. Wright testified on direct examination that his then current address was the penitentiary at Joliet and that he first really met defendant when they were together in the same tier in Cook County Jail after the date of the robbery. Under these circumstances, it was proper and pertinent for the State to cross-examine Wright as to whether he knew defendant, where they met and the extent of their friendship and contacts. Since defendant himself brought this aspect of the matter before the jury on direct examination, it was proper to allow the prosecution, in cross-examination, to probe further into the same facts. *People v. Scott*, 82 Ill.App.2d 109, 117; *People v. Snell*, 74 Ill.App.2d 12, 20. Furthermore, the bounds and latitude of cross-examination are within the discretion of the trial court. *People v. Nicholls*, 42 Ill.2d 91, 102, cert. denied 396 U.S. 1016; *People v. Curtis*, 123 Ill.App.2d 384, 387. Under the circumstances in this case, there was no abuse of discretion here; particularly in view of the fact that no objection was made by defendant. *People v. Davis*, 126 Ill.App.2d 114, 117. We find no error in the cross-examination of Wright.

Defendant next contends that he was denied a fair trial because of incompetence of his trial counsel appointed by the court. This contention is based upon alleged failure of trial counsel to raise certain objections; to tender certain instructions and to present the defense case in immediate sequence without interruption.

The last ground may be readily discarded. The record does not show that any material delay in the trial was caused by defendant's counsel. It does not appear that the jury was aware of any reason for any delay. Consequently, there is no demonstration that several short delays in presentation of evidence for defendant caused substantial or any prejudice to his case. *People v. Ashley*, 34 Ill.2d 402, cited in defendant's brief, illustrates the principle that charges of incompetent representation by trial counsel must be coupled with a showing of substantial prejudice to the defendant as a result thereof.

Many cases in Illinois have dealt with the problem of alleged incompetency of appointed trial counsel. The basic principles are clearly set forth in *People v. Logue*, 45 Ill.2d 170. There, the court held that, in order to establish inadequacy of appointed counsel, the defendant must clearly demonstrate (45 Ill. 2d 170, 172):

"(1) actual incompetence of counsel, as reflected by the manner of carrying out his duties as a trial attorney; and (2) substantial prejudice resulting therefrom, without which the outcome would probably have been different.' (*People v. Georgev*, 38 Ill.2d 165, 169, cert. den. 390 U.S. 998, 20 L.Ed.2d 97, 88 S.Ct. 1202; *People v. Morris*, 3 Ill.2d 437, 449.) The defendant must bear the burden of proof in regard to these elements. *People v. Caise*, 38 Ill.2d 486; *People v. Georgev*, 38 Ill.2d 165."

However, it has been repeatedly held that actual incompetency is not established simply because a lawyer fails to object to evidence or makes errors of judgment or trial strategy. "It is well settled that a review of appointed counsel's competence does not extend to those areas involving exercise of judgment, discretion or trial tactics." *People v. Nevith*, 102 Ill.App.2d 408, 414.

We will measure the representation given defendant on trial against the guideline of these principles. We find that the only criticism which can be made of defendant's trial counsel consists of matters of tactics or judgment. It is, of course, far easier to examine a record with the aid of hindsight than it is to exercise judgment in the actual trial of a contested case. Here, defendant's counsel obtained the proceedings of the previous trial and conducted a thorough cross-examination of the identification witnesses which supplied counsel on appeal with many of the arguments raised. In addition, trial counsel made a fine statement to the trial court in urging mitigation of punishment. This was rather a difficult task under the circumstances here presented. We conclude that defendant was well represented in the trial of his case before the jury. See, *People v. Armstrong*, 127 Ill.App.2d 457, 466.

Defendant's final contention concerns itself with the sentence. In July, 1968, defendant had been sentenced to a penitentiary term of from eight to 20 years for armed robbery. In the instant case, the trial court sentenced him to an additional such term of from 20 to 40 years, to be consecutively served. In this case, the imposition of the consecutive sentence was within the discretion of the trial court. Ill.Rev.Stat. 1969, ch.38, par.1-7(m). However, this court has authority to reduce the sentence in a proper case. 43 Ill.2d Rule 615(b)(4). We may not exercise this authority unless the sentence is greatly at variance with the purpose and spirit of the law, *People v. Hampton*, 44 Ill.2d 41, 48; and then we should proceed with "considerable caution and circumspection." *People v. Holmes*, 127 Ill.App.2d 209, 214. On the contrary, many well decided cases stress the fact that it is our duty to make certain that the sentence in each case is proportionate to the nature of the

offense and justified by all of the other pertinent facts and circumstances. *People v. Livingston*, 117 Ill.App.2d 189, 193; *People v. Dotson*, 111 Ill.App.2d 306, 311 and *People v. Lillie*, 79 Ill.App.2d 174, 178.

We cannot apply these divergent principles to the case at bar without some difficulty. We must consider the fact that the record demonstrates that the sentence appealed from was entered by an able and conscientious judge who had an opportunity to see and to watch the defendant and to examine into his background. The criminal record of this defendant also militates against him. On the other hand, he seems from this record to be a person of a good degree of intelligence and we cannot overlook the fact that he was 52 years of age when sentenced. Under the sentence appealed from, he could not hope to gain liberty for a minimum of at least 17 years. If the sentence were to be adjusted to make it concurrent with the previous sentence, he would be certain to serve a minimum term of approximately 12 years. However, in view of the applicable maximum of 40 years, the proper authorities in the exercise of their discretion, would have the power to keep him in custody for many more years, if required.

We have, therefore, concluded that the judgment of conviction for armed robbery is affirmed. The sentence is modified so that it will be served concurrently with the sentence of from eight to 20 years imposed in July of 1968.

Judgment affirmed.

BURKE, P. J. and LYONS, J. concur.



ABST.

MAR 20 1972

55302

2 I.A.³ 1104

CITY OF CHICAGO,)	
)	
Plaintiff-Appellee,	)	APPEAL FROM THE CIRCUIT
	)	COURT OF COOK COUNTY.
vs.)	
)	
JOHN A. HUTTER, JR., et al.,	)	Hon. Louis A. Wexler,
	)	Presiding.
Defendants-Appellants.)	

MR. JUSTICE GOLDBERG delivered the opinion of the court:

John A. Hutter, Jr. (defendant) appeals from an order entered by the Circuit Court of Cook County assessing a fine of \$500 against him for contempt of court for failure to comply with a mandatory injunction entered May 29, 1968.

This injunctional order found that defendant, his wife and another person owned real estate at 3526 North Marshfield Avenue, in Chicago, and were in violation of portions of the Building Code of the City as three apartments were being maintained on the fourth floor of the structure without sufficient provision for ingress and egress. The order required that any two apartments on the fourth floor be vacated. In effect, this would convert the floor into one single apartment, which would comply with the Code. Defendants appealed to this court and our opinion was filed May 19, 1969. The order for mandatory injunction was affirmed by this court. See City of Chicago v. Hutter, 110 Ill.App.2d 321. The opinion of this court used the following language (110 Ill.App.2d 321 at 326-27):

"The public benefit resulting from the enforcement of the ordinance in the instant case clearly outweighs any detriment or loss of income suffered by the defendants. Protection from fires and the resulting casualties is the primary duty of the city."

Thereafter defendants attempted to obtain reversal of this result in the Supreme Court of Illinois, the United States Supreme Court and the United States District Court. All of these attempts were unsuccessful.

In due course, the Circuit Court entered a rule on defendant to show cause why he should not be punished for contempt of court. On October 9, 1970, the Circuit Court entered an order finding defendant in contempt of court for willful disobedience of, and failure to comply with, the mandatory injunction and assessed the \$500 fine against him.

We are confronted here with a plethora of briefs, original, supplemental and additional, not to mention motions, and counter-motions of all kinds and descriptions, filed by defendant in his own behalf. This mass of paper work is primarily a reargument of the issues formerly decided by this court, combined with presentation of a multitude of extraneous and immaterial arguments. It is virtually sufficient to elevate this case to the status of the Jarndyce case of literary fame.

It is axiomatic that the previous order of the Circuit Court for mandatory injunction, affirmed by this court, settled and decided with finality all issues between these parties with reference to the propriety of the mandatory injunction. The former judgment of the Circuit Court, affirmed by this court, is conclusive not only as to all questions actually decided but as to all questions which might have been litigated and determined therein. *Gregory v. County of La Salle*, 40 Ill.2d 417, 422; *City of Peoria v. Peoria City Lines, Inc.*, 24 Ill.2d 457, 461; *Sobina v. Busby*, 62 Ill.App.2d 1, 17. The only matter open for our consideration is the proceedings which found defendant in contempt and resulted in the fine. No questions are raised by

defendant in this regard nor are any pertinent authorities cited. It follows that the finding of contempt against defendant is necessarily affirmed.

In our opinion, defendant is engaging in futile litigation to his own detriment. It is essential that he comply with the mandatory injunction. No alternative exists. Yet, under all of the circumstances shown in this record and revealed to us in extensive oral arguments, we feel that defendant should be given a final opportunity to comply with the law and make his peace with the proper authorities. With the hope of facilitating this most desirable result, we will exercise our power to reduce the amount of the fine imposed for this contempt. 43 Ill.2d Rule 615(b)(4). Accordingly, the judgment for contempt against defendant John A. Hutter, Jr. is affirmed but is modified by reduction of the fine imposed to the amount of \$100.

Judgment of contempt against
defendant affirmed, fine reduced.

BURKE, P. J. and LYONS, J. concur.

RESERVE BOOK

ILLINOIS APPELLATE - 3rd Ser

UNPUBLISHED OPINIONS

V. 1-2

107673

This reserve book is NOT transferable and must NOT be taken from the library ~~or~~ ~~clerk~~

You are responsible for the return of this book.

DATE	NAME		
10-26-73	Sam B. Bawle	368	8330
9	Strom	332	8309
1/4/73	Mulgray	368	1666
2/25/73	Charles W. Jones	641	6888
6/10/74	Fine	236	672
7/10/74	Testomell	726	6080
7/11/74	H. B. Johnson	793	5472
7/26/74	Shelton	726	6080
8/24	Graciano	726	6080
		107673	1000

ILLINOIS APPELLATE - 3rd Ser

UNPUBLISHED OPINIONS

Vols. 1-2

107673

AUG 73

N. MANCHESTER,
INDIANA

